

THE  
TRIAL  
OF

*James Carnegie of Finhaven,*

For the Murder of

CHARLES

*Earl of STRATHMORE,*

On the 9<sup>th</sup> May 1728.

---

*Extracted out of the Records of the Court of Justiciary.*

---



---

E D I N B U R G H :

Printed by Mr. THOMAS and WALTER RUDDIMANS,  
and sold at their Printing-house in the Parliament-Close,  
M. DCC XXIX.

[Price 2 sh. Sterl. stitch'd.]



THE

# TRIAL

OF

James Carnegie of Findhorn

For the Murder of

# CHARLES



# EDMUND

On the 21st May 1798.

At the Court of the Lord High Steward.

THE

EDINBURGH

Printed by Mr. Thomas and Walter R. Edinburg  
and sold at their Printing House in the Parliament Close.  
M. DCC. LXXX.

[Printed & Published by W. & A.]



# Curia Justiciaria S. D. N.

Regis, tenta in novo Sessionis Domo Burgi de Edinburgh, decimo quinto die mensis Julii, Millesimo septingentesimo vigesimo octavo, per honorabiles Viros ADAMUM COKBURNE de Ormiston, Justiciarium Clericum; Dominos JACOBUM MACKENZIE de Roytoun & GULIELMUM CALDERWOOD de Poltoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GUALTERUM PRINGLE de Newhall, & Magistrum ANDREAM FLETCHER de Miltoun, Commissionarios Justiciarum dicti S. D. N. Regis.

*Curia legitime affirmata.*

INTRAN.

**J**AMES CARNEGIE of Finhaven, Prisoner in the Tolbooth of Edinburgh, Pannel, indicted and accused at the Instance of Susanna Countess of Strathmore, and Mr. James Lyon, Brother-german and nearest of Kin to the deceased Charles Earl of Strathmore, with Concourse, and at the Instance of Duncan Forbes Esq; his Majesty's Advocate, for his Highness



self's Interest, for the Crime of *willfull* and *premeditated*  
*Murder* committed by him upon the Person of the said  
*Charles Earl of Strathmore*, as is more fully mentioned in  
 the Indictment raised against him thereanent, which is as  
 follows; "*James Carnegie of Finhaven*, now Prisoner  
 in the Tolbooth of *Edinburgh*, you are indicted and ac-  
 cused at the Instance of *Susanna Countess of Strathmore*,  
 and *Mr. James Lyon*, Brother-german and nearest of Kin  
 to the deceased *Charles Earl of Strathmore*, with Concourse  
 and at the Instance of *Duncan Forbes Esq;* his Majesty's  
 Advocate, for his Highness's Interest: THAT WHERE,  
 by the Laws of GOD, the Law of Nature, the Common  
 Law, and the Municipal Law, and Practice of this King-  
 dom, as well as the Laws of all well governed Realms,  
*willfull* and *premeditated Murder*, and all *Murder* and  
*Homicide*, or being Act and Part thereof, are most atro-  
 cious Crimes, and severely punishable; yet true it is  
 and of Verity, That you have presumed to commit, and  
 are Guilty, Actor, or Art and Part, of all, or one or o-  
 ther of the foresaid horrid Crimes: IN SO FAR AS, ha-  
 ving a causeless Ill-will and Resentment against the deceased  
*Charles Earl of Strathmore*, you conceived a deadly Ha-  
 tred and Malice against him; and shaking off all Fear of  
 GOD and Regard to the foresaid loveable Laws, on  
*Thursday* the Ninth of *May*, in this present Year One  
 thousand seven hundred and twenty eight, or one or other  
 of the Days of the said Month, about the Hour of Eight  
 or Nine of the Night of that Day, or some other Hour of  
 that Day or Night, upon the Street of the Town of *For-*  
*far*, within the County of *Forfar*, you did, with a  
 drawn Sword, or some other offensive or mortal Weapon,  
 without the least Colour or Cause of Provocation then  
 given by him, invade the said deceased Earl, who had no  
 Weapon in his Hand, and did basely and feloniously mur-  
 der and kill him, by giving him a Wound therewith in the  
 Belly,

“ Belly, some Inches above the Navel, which, by follow-  
 “ ing the Thrust with a second Push, went through the In-  
 “ testines and the Back, a little lower than where the said  
 “ Weapon entred the Belly: Of which Wound, after great  
 “ Pain, on *Saturday* immediately thereafter, or in some  
 “ short Space thereafter, he died; and so was cruelly and  
 “ barbarously murdered by you. AT LEAST, at the Time  
 “ and Place above mentioned, with a drawn Sword, or some  
 “ other mortal Weapon, without any just Cause or Provoca-  
 “ tion, you gave the said deceased *Charles Earl of Strathmore*  
 “ a Wound in the Belly, which reached through the Inte-  
 “ stines and Back, wherethrough he soon after fell down and  
 “ died thereof at the Time aforesaid. AT LEAST, at the  
 “ Time and Place above described, the said *Charles Earl of*  
 “ *Strathmore* was with a drawn Sword, or some other dead-  
 “ ly Weapon, feloniously and barbarously wounded, and of  
 “ the said Wound died within a few Days thereafter; and  
 “ you were Art and Part in his Murder. By all which it is  
 “ evident, That you are Guilty, Art and Part of the Crimes  
 “ of wilfull and premeditate Murder and Homicide, or  
 “ one or other of them, at the Time and Place, and in the  
 “ Manner above set forth. And which Facts, or Part there-  
 “ of, or your being Art and Part of any of the saids Crimes,  
 “ being found proven by the Verdict of an Assize, in Pre-  
 “ sence of the Lords, Justice-General, Justice-Clerk, and  
 “ Commissioners of Justiciary, you ought to be exemplarily  
 “ punished with the Pains of Law, to the Terror of others to  
 “ commit the like in Time coming.”



Pursuers.	Procurators in Defence
Mr. Duncan Forbes, his Majesty's Advocate.	Mr. Robert Dundas Advocate.
Mr. Charles Areskine, Solicitor.	Mr. James Fergusson senior Advocate.
Mr. Alexander Hay Advocate.	Mr. John Forbes Advocate.
Mr. Patrick Grant Advocate.	Mr. William Grant Advocate.
Mr. George Ogilvie Advocate.	Mr. James Paterson Advocate.
Mr. John Ogilvie Advocate.	Mr. George Smollet Advocate.
Mr. Hugh Dalrymple Advocate.	

The Libel being openly read in Court, and debate viva voce, in Presence of the Judge Lords, They ordained both Parties to give in their Informations to the Clerk of Court, in order to be recorded; the Pursuers to give in theirs against Saturday next, and the Pannel's Procurators to give in his against Friday thereafter: And continued the Cause to the First Day of August next to come, at Nine a clock Morning; and ordained Witnesses and Affixers to attend at that Time, each Person, under the Pain of Law; and ordained the Pannel to be carried back to Prison; and granted second Diligence for the Pursuers, against the Witnesses.

INFOR.

INFORMATION For *Susanna Countess of Strathmore*, and *Mr. James Lyon*, Brother-german to the deceased *Charles Earl of Strathmore*, and his Majesty's Advocate for His Highness Interest;

AGAINST

*JAMES CARNEGIE* of *Finhaven*, *Pannel*.

**T**HE said *James Carnegie* is indicted and accused, as Guilty, Art and Part of wilfull and premeditated Murder; at least, of Murder and Homicide; In so far as, upon the Ninth of May last, upon the Streets of *Forfar*, with a drawn Sword, he wounded the deceased *Charles Earl of Strathmore* in the Belly, some Inches above the Navel; which Wound went through the Intestines and the Back, a little lower than where the said Weapon entered the Belly; of which Wound he died soon after.

THE Indictment, in the First Place, charges the Fact, as proceeding from a causeless Ill-will and Relentment the Pannel had conceived against the Defunct, who at the Time the Wound was given had done nothing that could be pretended as a Colour or Cause of Provocation: And a Circumstance is noticed, from which it may be inferred, that there was deadly Hatred and Malice; namely, That after one Push there was a second, whereby the Wound went quite through his Body.

THERE



THERE is a *Second Branch* of the Indictment, in which the Circumstance of *premeditate Malice and forethought Felony* needed not to be libelled, and he is charged only with *Murder or Homicide*, as separately relevant. And *Lastly*, Art and Part is charged upon him.

At calling before the Lords of Justiciary, against the *First Branch* of the Indictment it was excepted, "That the Indictment was too general, particular Circumstances not being express from which the causeless ill-will or Resentment mentioned, and forethought and premeditate Malice could be inferred, whereby the Pannel was deprived of the Benefit due to all Pannels, when tried for their Life, to exculpate himself, by shewing, that if at any Time prior to the Time mentioned in the Indictment, there was any appearance of Grudge or Quarrel between the Defunct and him, there was an After-reconciliation and intire Friendship: And it was said, That general Libels ought not to be sustained."

To this it was answered, That a previous Grudge is charged, and that the Deceat was invaded without the least Colour or Cause of Provocation; which is the strongest Evidence of Forethought, especially when joined with this other Particular, That the first Thrust was followed with a second Push, which was a Mark of inveterate and relentless Malice; and that it was sufficient to charge a previous Quarrel in general, which would be made appear by the Proof. Nor will it be found, that in Libels of forethought Felony, it is usual or necessary to libel all the Circumstances from which the Forethought may be presumed, especially when the *species facti* is charged in that manner, as affords the Presumption of *Forethought*, setting forth, That the Wound was given, without the least Colour or Cause of Provocation on the Part of the Defunct at that Time. Neither can it be thought unfair with regard to the Pannel, who if he had any relevant Ground of Exculpation, would have Access to prove Friendship

ship with the Defunct, to take off any Charge of precedent Quarrels, whereof he could not be ignorant. And still there must be left Ground of Complaint, where no good Reason of Exculpation is offered, whereby the Pannel can be allowed to adduce Proof, which 'tis believed is, without Contradiction, the Case upon the first Branch of the Libel.

As to the two last Branches of the Indictment, it was alledged, " That several Circumstances attending the Fact complained of were concealed, which, when opened, afforded the Pannel plain and obvious Defences; and therefore it was informed, That the Pannel, a Person disposed to Peace, and in intire Friendship with the Defunct, chanced to be in Company with him about the Time charged in the Indictment, with one *John Lyon of Bridgeton*, and others; That *Bridgeton* gave him the highest Provocation, not only by Words, but by proceeding so far, as to throw him into a Kennel, where the Pannel was in hazard of perishing, being extremely drunk; That getting up, heated with Liquor, and so extremely provoked, he drew his Sword, and pursued *Bridgeton*; and that the Defunct thrusting himself between them, casually received the Thrust aimed at another."

From these Circumstances it was pled for the Pannel, " That if he did kill the Defunct, it was a mere Misadventure, rather a Misfortune as a Fault, and in no Event could subject him to the *pœna ordinaria*; for that, *imo*, In these Circumstances had he killed the said *John Lyon of Bridgeton*, the Pain of Death could not have been inflicted either by the Law of God, the Common Law, nor by the Municipal Law of this Kingdom, neither by the Laws of other well governed Realms; particularly by the Laws of our neighbouring Nation, in regard the Fact was done of Suddenry, by a Person in Drink, and highly provoked."

AND *imo*, As to the Law of God, Chap. xxi. v. 13. of *Exodus* was appealed to, where it is said, *That if a Man*



*by not in wait, there was to be a Place appointed whether he should fly; which seemed to require Forethought. And the xxxv. Chap. of Numbers, v. 22. where it was said, That if any one thrust another suddenly without Enmity, the Congregation was to judge between the Slayer and the Revenger of Blood; from which it would seem, that Slaughter of suddeny was not punishable by Death.*

To this it was answered, That in the Law of God the general Rule was, *Whoso sheddeth Man's Blood, by Man shall his Blood be shed: And at the Hand of Man, and at the Hand of every Man's Brother, and at the Hand of every Beast was the Life of Man to be required, Gen. Chap. ix.* That by the Law of Moses, Death of a suddeny was plainly capital; nor had the Manslayer the Benefit of the City of Refuge, but where the Slaughter was mere Misfortune and casual, which was plainly the Meaning of the Words in Exodus, *If a Man by not in wait, but GOD deliver him into his Hand;* which could not with any Propriety be understood of Slaughter committed, where the Intention and Design antecedit ictum licet non congressum.

AND this Matter is clearly explained in the xxxv. Chap. of Numbers, where he who smites with an Instrument of Iron is called a **MURDERER**; and where it is said, *That he who smites with a throwing Stone, or with a Hand-weapon of Wood, wherewith a Person may die, and he die, the Murderer is surely to be put to Death.* And then the Law proceeds plainly to treat of Cases where Death ensues from Strokes or Thrusts of a Weapon not deadly, and there it requires indeed Hatred and Enmity; but if it be done suddenly and without Enmity, or (which is remarkable) in the 23d v. *With any Stone wherewith a Man may die, seeing him not, and was not his Enemy, nor sought his Harm; then the Congregation was to judge between the Slayer and the Revenger of Blood.* From which 'tis plain, that Slaughter upon suddeny, even without Forethought or previous Enmity.

mity, was capital by the Law of *Moses*, if the Wound was  
 given with a lethal Weapon, except when it was done by mere  
 Chance, as by throwing a Stone whereby a Man may die,  
 the Person who threw it seeing him not, and so at no Time  
 was his Enemy, or sought his Harm. And this is the Case  
 mentioned, Chap. xix. v. 4. *Deuteron.* where it is said,  
*Whoso killeth his Neighbour ignorant by, whom he hated not*  
*in Time past* (which is limited by the Example immediately  
 subjoined to Homicide merely casual) *shall fly into one of*  
*these Cities and live.* Now in the present Case, the Nature  
 of the Weapon and of the Wound are such, as clearly ex-  
 clude founding with any Colour upon the Disposition of the  
 Law of *Moses*, tho' the Question were of the Pannel's claim-  
 ing the Benefit of the City of Refuge. But neither is it an  
 Argument of any Force to plead, that where the Benefit of  
 the City of Refuge was granted, that by the Law of Nature  
 the Crime was not capital; for the Revenger of Blood could  
 never have been tolerated to kill without the City of Re-  
 fuge, where innocent Blood was spilt, whereby the Land  
 must have been polluted, and the Subjects were permitted im-  
 punè, so notoriously to break in upon the established Laws of  
 Nature; and therefore, tho' it is an Argument of unavoidable  
 Force, that wherever by the Law of *Moses* capital Punish-  
 ments are allowed, such Punishments are lawful: But the Ar-  
 gument is not of equal Strength, that where the Powers of  
 the Law were suspended by the *jus asyli* established by po-  
 sitive Precept, that therefore in Countries where there is no  
 such Privilege, either by the Laws of God, or the Laws of  
 the Land, that there the Punishment is not to be capital,  
 where the *jus asyli* could have been claimed. *ante* *capitulum*  
*2do.* It was contended, " That by the Common Law, not  
 " only *dolus*, but *propositum* was necessary; and that Slaugh-  
 " ter committed *impetu & rixa* were not to be punished ca-  
 " pitally." And to this purpose the Authority of the learn-  
 ed *Voet* was cited, who seems to say, *That in rixa, if the*  
*Person*



Person cannot be discovered who gave the deadly Wound; the ordinary Punishment should not take place.

But when this Matter is considered, 'tis plain there arises no good Argument for the Pannel from the Common Law: For tho' there is a Difference to be made between *propositum* and *machinatio premeditata*, and sudden Passion and Heat of Drink, determining the Will to commit the Crime; yet as Laws were made and became necessary, chiefly from the depraved Passions of Mankind, they cannot afford a sufficient Excuse against the ordinary Punishment of an atrocious Crime; and there is *dolus*, when a Crime is even committed of a sudden, altho' there be no Forethought: So it is commonly said, that Opportunity makes the Thief, and Theft is committed *impetu*, nevertheless not without Dole. Nor is it necessary to prove or libel a Forethought in the Commission of the Crime. In the same manner Passion or Provocation may unfortunately determine the Will to the Commission of a horrid Crime, but it would be of dangerous Consequence to allow of Bloodshed under Colour of Passions which Men ought to subdue, or of Drunkenness which they ought to avoid, or of a sudden vicious Turn of Mind; and therefore in the Roman Law, whoever committed Slaughter *dolo malo*, whether deliberately and upon Forethought, or of Suddenness, was to be punished *ex lege Cornelia de Sicariis*: And to show that it was sufficient that the Design should only precede the Act from which Death followed, and not the Meeting of the Persons, as the Acts of the Mind are only to be known by external Circumstances; the kind of Weapon, in the same manner as in the Law of Moses, was sufficient to found a Presumption of such *propositum* as, join'd with the Act of Killing, brought the Manslayer under the *pœna legis Corneliae*: So in the l. 1. § 3. ff. *ad legem Corneliam de Sic.* it is said, *Si gladium strinxerit, & in eo percusserit, indubitate occidendi animo id eum admisisse*; and if prior Forethought had been necessary, the kind of Weapon could not possibly

possibly have founded a sufficient Presumption: But as it manifestly made appear the Intention to kill, whether that Intention had its Birth from Passion or Drink, it was voluntary Slaughter, done *de libera opera*, and therefore to be punished capitally. And the Passage cited from the learned Voet rather confirms this Doctrine, That if *in rixa*, which must suppose Suddenness, the Persons who inflicted the mortal Wound was discovered, he was to be subjected to the ordinary Punishment. And the same Author, § 9. of that Title observes, That tho' such as commit Slaughter, *calore iracundie*, may be said *impetu delinquere*; yet there *neque judicium, neque assensus animi, neque voluntas deest*; and says, That a Person provoked by verbal Injuries, how great soever, was not free from the *pœna ordinaria*. And the Truth is, if Passion and Provocation were sufficient to excuse Slaughter, it were in vain to lay down the Rules so anxiously conceived in the Laws concerning the *moderamen inculpatae tutelæ*, where the Slayer must prove that he was *constitutus in periculo vite*. And had the Case stood otherwise in the Roman Law, it could never have been doubted, when Jealousy was the Rage of a Man, and Adultery the highest Provocation against a Husband, and a real Injury; the Question could never have been stated to be determined by the Emperor, as in l. 38. ff. § 8. *ad legem Juliam de adult.* Whether a Husband, *impetu iræ et doloris, uxorem in adulterio deprehensam interfecerit*, was liable to the *pœna legis Corneliae de Sacerdotibus*? And who by that Decision, upon the peculiar Circumstances of the Case, was exempt'd, and nevertheless made subject, *si loci humilis*, of being condemn'd *ad opus perpetuum*, and if *honestior* was to be condemn'd *relegari in insulam*. But as the Case must be determined upon the Law of Scotland, 'tis unnecessary to dwell too long upon the Arguments drawn from the Roman Law.

3510. It was contended for the Pannel, " That by the Law of Scotland, Slaughter and Murder were of old different

negligent

32

" Species



Species of Crimes, and only Murder committed upon forethought Felony was properly computed *Murder*, and punished as such; but that Slaughter committed upon Suddeny, or *chaud melle*, and *in rixa*, was deem'd only *homicidium culposum*, and not punishable by Death." And to support this Position, several Acts of Parliament were appealed to, By which it was statuted; That Murder was to be capitally punished; but *chaud melle*, or Slaughter committed upon Suddeny, was to be punishable according to the old Laws: And that in this Case, if the Pannel had even killed *Bridgeton*, at whom he aimed the Thrust, in the Circumstances above set forth, it was not Murder upon Forethought, but upon Suddeny and high Provocation.

To this it was answered, That this Doctrine, so directly contrary to the received Opinion, had little Countenance from the old Laws and Acts of Parliament, less from the constant Practice before the Act of Parliament King *Charles II.* in the Year 1661, and stood in plain Contradiction to this last Law, and the constant Practice and repeated Decisions of the Court of Justiciary from that Time down to this Day.

By the old Law, particularly *Echap. 3.* of the first Statutes of King *Robert I.* intituled, *Men condemned to the Death should not be redeemed.* It is statuted and ordained, *Et si any Man, in any Time coming or bygone, is convict or attainted of Slaughter, Heil, or any other Crime touching Life and Limb, common Justice shall be done upon him, without any Ransome.* Here Slaughter in general is mentioned; and Justice was to be done upon the Person convict of it, and the Punishment by the Title was plainly Death: So that at Common Law, Slaughter in general was capital. The next Paragraph does indeed save the King's Power, (which must be the Power of Pardoning) and the Liberties granted by the King to the Kirk and Kirkmen, and other Lords; which must be understood of special Immunities in the Case of Manslaughter: For no Privilege

Privilege was to protect against Murder upon Forethought; and the Exception confirms the Rule.

By Chap. 49. of the Statutes of King Robert II. it is statuted, *That na Man use any Destruction, Detracting, Burning, Roff, Slaughter, in Time to come, under the Pain of Cintel of Life and Goods*: Whereby the Pain of Death is clearly made the Punishment of Slaughter in general. And in the immediate subsequent Chapter, the Sheriff was to take diligent Inquisition of Destroyers of the Country, or such as had destroyed the King's Lieges with Herfhips, Slaughter, &c. and was to take Bail from them, if arrested, to compear at the next Justice-ayr; and if Bail was not given, the Sheriff was to put him to the Knowledge of an Assize: *And gif he be tayne with the Assize for sick an Trespassour*, it is said, *he shall be condemned to Death*: Which seems only to relate to Manslaughter, and not to Murder upon forethought Felony, which was one of the Pleas of the Crown, to be tried only before the King's Justiciar, as is evident from Chap. 11. King Malcom II.'s Laws, and Chap. 13. and 15. whereas Slaughter might be tried by the Sheriff, where there was a certain Accuser, as appears from Book I. of the *Regiam Majestatem*, Chap. 1. § 7, 8, 9.

THERE are sundry others of the old Statutes, that seem plainly to presuppose that Slaughter was capital, and particularly these of Alexander II. Chap. 2. § 3, 4, 5, 6. And so Skene, in his Treatise of Crimes, Tit. 2. Chap. 6. says, *That Slaughter in rixa, or chaud melle, is generally punished by Death, and Confiscation of the moveable Goods pertaining to the Trespassour; but with this Difference, that the Girth or Sanctuary was no Refuge to him who commits Slaughter by forethought Felony, but he should be delivered to the Judge Ordinary, to underly the Law*: Which plainly appears from Act 23. Parl. 4. James VI. whereby Masters of Girth are ordained to deliver up such Persons as are guilty of Murder upon forethought Felony. And 'tis in vain to found

upon



upon Law 99. Part. 6. James I. which says in the End. *Bill it be forethought Felony, he shall die therefore; because the Act relates to all Manslayers; and tho' that particular and most atrocious Species be mentioned, as that for which the Murderer should die, yet the Argument will not hold, That therefore no other kind of Slaughter was capital: For it is there said in the general, That if the Slayer is taken with red Hand, the Law shall be done upon him within that Sum; which cannot be understood of a Crime not capital. And Sir George Mackenzie, in his Observations upon it, says, This may seem to imply that Men die not for Murder committed without forethought Felony; but this holds not in our Law, for Murder, tho' committed without forethought Felony, is punishable by Death, except it was either casual, or in Self-defence.*

The Act 51. Part. 3. James I. was improperly founded on by the Pannel's Procurators; for that Act does no more than extend the Difference between forethought Felony and *chaud melle* to all Transgressions as well as Slaughter, as Sir George Mackenzie observes upon that Law, where he says, That *chaud melle*, or *homicidium in rixa commissum*, is capital by our present Law.

THAT Criminals who resorted to, and took Sanctuary in Churches, had Protection, tho' their Crimes were capital, is extremely plain from Chap. 6. of the Statutes of K. Alexander II. where 'tis said, That Thieves and Robbers who fly to Holy Kirk, if moved with Repentance, he confess that he has habily sinned, and for the Love of God is come to the House of God for Safety of himself, he shall have peace in this manner, That he shall not lose his Life nor Limb, but restore what he had taken, and satisfy the King, and swear upon the Evangel, That for thereafter they shall never commit Theft nor Theft; but if he declared himself innocent, he was to be cry'd. And in the last Paragraph of that Chap.

it is said, "Whosoever Manlayers, &c. if they do, in  
"manner foresaid, to the King, the Law aforesaid  
"shall be kept and observed to them."

THERE seems to have been this other Difference too by  
the Books of the old Law between Murder upon Forethought  
and Slaughter, That the Trial of Murder was *summar*, where  
as Manslaughter could not be tried till after forty Days, as ap-  
pears by the Statutes of Robert II. from *Chap. 3.* to *Chap. 9.*

AFTER the Reformation, when the *ius asyli*, formerly  
given to Churches, drop'd, the Distinction between Murder  
and Manslaughter was look'd on with less Attention, and Li-  
bels were commonly framed indifferently, for Murder, and  
Slaughter in general, without any mention of forethought Fe-  
lony; nor was it ever objected, that Malice or premeditate  
Design was requisite to make the Crime capital: And Crimi-  
nals were punished to Death, where from the Proof there was  
not a Colour or Pretence of Forethought, or any premeditate  
Design, as will appear from looking into the Books of Ad-  
journal. And many Instances might be given, particularly  
in the Case of *Jean Currie*, against *William Fraser*, the  
last of *July 1641*; where the Pannel was condemned upon an  
extrajudicial Confession, adminiculated with other Circum-  
stances; in which he set forth the Fact, That the Defunct  
and he had some little Quarrel about a Staff; and hearing  
that he had murdered his Brother, he came into a House  
where the Defunct was; and that either the Defunct or some  
other that was by, took the Pannel by the Arm, to hold him:  
Having freed himself, he aim'd a Stroke with a Whinger at  
the Defunct's Arm; but missing it, he struck the Defunct a-  
bout the Pap. And upon this Proof he was found guilty,  
and executed.

IN the Case of *Bruce* against *Marshall*, the *3d April 1644*,  
Slaughter was libelled, and he was condemned upon his own  
judicial Confession: From which it appears, that he was so  
far from having any Forethought, that he suffered not only  
the



the greatest Provocation in Words, but was even beat with Hands and Feet by the Defunct while he was on the Ground; but at last getting up, and (as the Confession bears) being overcome with Passion, he drew a Knife, and struck at him in two several Places of his Body, whereby he died. And upon this Confession, where there was Suddenty, Provocation and Passion, he was brought in as guilty, and condemned to be beheaded.

THE Law remaining somewhat uncertain concerning casual Homicide, and there being no longer any Benefit of Girth as formerly, in the Year 1649, an Act was past during the Usurpation, for removing all Question and Doubt that might thereafter arise in criminal Pursuits for Slaughter, ordaining, That the Cases of Homicide after following, *viz.* casual Homicide, Homicide in lawful Defence, and Homicide committed upon Thieves and Robbers, should not in Time coming be punished by Death, notwithstanding any Laws or Acts of Parliament, or any Practick made heretofore, or observed in punishing of Slaughter. And this past into a Law after the Restoration in the Year 1661; and at the same time, all Decisions given conform to this Act, since the 4th of February 1649 Years, are declared to be sufficient to secure all Parties interested, as if the Act had been of that Date; which was necessary, because the Acts during the Usurpation had been rescinded: And this Law has ever been lookt upon as the Standart. And the Practice of the Court of Justiciary since that Time, clearly demonstrates, that Slaughter of Suddenty, and Slaughter upon Provocation, which could not be brought under one or other of the Particulars there mentioned, have been taken to be capital.

THE Procurators for the Pannel here observed, " That though in the Cases there mentioned, the Law ordained Slaughter not to be capital, yet it neither said nor supposed that the former Law, whereby Pannels were entitl'd to plead against a capital Punishment, was thereby abrogated, but

“ but only statuted in the Cases there mentioned.”

To this it was answered, That the Narrative of the Statute was for removing of all Question and Doubt that may arise thereafter in criminal Pursuits for Slaughter, and consequently cannot be supposed to have left doubtful Cases, that the Pannel's Procurators must admit were not so clear as casual Homicide, and Homicide in Defence; nay the Law seems to suppose pretty plainly, that all Slaughter by the Laws and Acts of Parliament, or Practicks was capital, not declaring what was Law from any other Period than the Year 1649, but enacting the same with *à non obstante*, and judging it necessary to confirm the Decisions that had past, conform to that Act during the Usurpation, which would have been vain, if it had not been at least doubtful, whether casual Homicide, Homicide in lawful Defence, and Slaughter committed upon Thieves and Robbers, did not subject those guilty to the Pain of Death: And if those Degrees of Homicide were so much as doubtful, it is not possible to conceive that *chaud melle*, or Slaughter committed, *dedita opera*, tho' without Forethought, was, by the Law of *Scotland*, not capital. Or if it should be supposed to have been doubtful, whether these last Degrees of *Homicide* were capital; that the Legislator upon a Narrative, that all Question and Doubt that might arise hereafter in criminal Pursuits for Slaughter, should be removed, would have enacted in the clearer Cases, with *à non obstante*, and left the more difficult in the Dark, as surely the greatest Advocates for Slaughter on Suddenty must admit; that at least, it is more culpable than either Homicide merely casual, or Homicide in lawful Defence.

THE Argument drawn from the Rubrick of the Act, which mentions Degrees of casual Homicide only, can conclude no more than that the Title is imperfect; and it would be resting too much upon an Argument *à rubro*, to make it defeat what is said in the Law, that all Questions concerning Slaughter were thereby to be removed, and which opposes casual



Homicide to Homicide in lawful Defence, and consequently cannot under the Words *casual Homicide* comprehend all Slaughter not upon forethought Felony. And Sir *George Mackenzie* in his Observations upon the Act takes notice, That the Title is very ridiculous, and consequently no Argument can be drawn from it.

ONE Thing may not be improper to notice, is, That if Killing by forethought Felony was the only Species of Slaughter capital, the Crown was disabled from pardoning any capital Slaughter whatsoever, which does not appear to have been the Opinion of our Lawyers.

As to the Decisions subsequent to this Law, they will be found intirely agreeable to the Doctrine now laid down; Sir *George Mackenzie* observes, that tho' many Lawyers are positive, that tho' *homicidium in rixa*, even where the Author of the Plea is known, may by the Rigor of Law be punished by Death, yet that no Country uses this Rigor; yet he remembred, that in *William Douglas's* Case this was urged, and albeit it was not proven that he was the Killer, yet the Assize found him guilty, and he thereupon died. This is a Case more favourable, than where the Person that gave the mortal Wound is known, tho' given suddenly, and even upon Provocation; and therefore shows what our Law is, and with how little Reason the Procurators for the Pannel maintain their Argument upon the Law of *Scotland*.

IN the Case, His Majesty's Advocate against *Nicolson*, the 24th June 1673, Murder and Slaughter, without Forethought, were charged upon *Nicolson* the Pannel, and his Procurators pleaded the Benefit of the Act of Parliament anent casual Homicide, in the several Degrees thereof, he being in a Condition that he was not able to remember. To this it was answered, That the Defence was not relevant, in regard the Homicide could not be said to be casual, such as the Case of throwing of Stones over Dikes, and killing accidentally a Passenger: And the Pannel having afterwards proponed a Defence

fence, That being in use to carry a Gun as a Fowler, and calling accidentally for Meat to his Dogs at a Mill, the Defunct fell upon him, and offered to secure him as a *French Soldier*, or fit to be one; in the Struggle, his Gun being a half Bend, went off and killed the Defunct: Both the Libel and Defence were found relevant, and it appeared upon the Proof, that *Nicolson* was drunk, and that there was no previous Quarrel, but taking Exception at somewhat the Defunct said, he shot him with his Gun; and by the Verdict of the Assize, *he was found guilty of the Slaughter committed upon the Defunct*, and sentenced to have his Head struck off in the *Grassmarket*; which shows that neither Drunkenness nor Suddenry is a relevant Defence against the *pœna ordinaria* in Slaughter.

AND in the Case of *Murray contra Gray*, 10th June 1678, the Lords found the Libel relevant, and that there was no Necessity of any distinct Probation for proving pre-cogitate Malice; which clearly shows that Slaughter, other than upon Forethought was capital. And to show that Provocation and Passion are not received as Defences against the *pœna ordinaria*, a Multitude of Decisions might be brought, particularly in the Case of *Aird*, who was indicted on the Day of

1693, for the Slaughter of *Agnes Bayne*, having given her some Strokes on the Side and Belly with his Foot, by which she fell into fainting Fits, and immediately died. The Defence was, *Great Provocation and casual Homicide*: Provocation in as far as she threw a Chamberpot in his Face; and when he gave her hard Words, she and her Neighbours fell upon him and beat him, upon which he gave her the Strokes above mentioned. And in that Trial it was argued, there was no *animus occidendi*, no previous Malice, no mortal Weapon; and the Texts from Scripture urged in Defence of the present Pannel, and the Arguments from the Civil Law, and from our own Acts of Parliament were urged; nevertheless the Lords found the Libel relevant,



relevant, repelled the Defences; and, upon the Proof, he was sentenced to die.

IN the Case of *William Carmichael*, on the Day of 1694, *Drunkennes* was founded on to excuse a *pœna ordinaria*, and Forethought was neither libelled, nor proven; and the Lords found the *Libel* relevant; and, upon the Proof he was sentenced to be hanged.

IN the Year 1695, *George Cuming* Writer in *Edinburgh*, was indicted for the Crime of *Murder* or *Manslaughter* of *Patrick Falconer*; the Defences now offered for the Pannel upon the Distinction in the old Law, between Forethought and *chaud melle* were offered; nevertheless the Libel was found relevant, and the Assize returned a Verdict, *Guilty of Manslaughter*, upon which he was condemned to die.

IN the Case of *Burnet of Carlops*, the 22d *January* 1711, tho' a Defence was sustained, yet the Libel without Forethought was found relevant: And in that of *Hamilton of Green*, the 30th *June* 1716, the Pannel offered to prove, That he was accidentally at the House of *Thomas Arde*, of whose Murder he is accused, at the Day libelled with some of his Acquaintances, and had no deadly Weapon along with him; That he became inebriated to a great Degree, and having left the House, and returned to ask for the Slip or Cover of the Sheath of a Sword, the Defunct gave him most indecent, injurious and scurrilous Language, and persisting in it, the Pannel push'd, or struck at him with his Sword, having the Scabbard thereon, that he had Reason to believe had a Crampet upon it: And being still more and more provoked by repeated injurious Words, to protect himself from further Insolence he had Reason to look for, the Pannel still remaining a Horseback, the Defunct rush'd himself upon the Sword. And this circumstantiate Fact was offered to be proven; nevertheless the Libel was found relevant, and the Pannel's hail Defences repelled, and upon the Proof, was sentenced to have his Head severed from his Body, and was accordingly beheaded.

IN

IN the Case of *Thomas Ross* and *Jaffrey Roberts*, the 20th July 1716, it was pled for the Pannels, That being Recruits lately come from *England* to *Scotland*, and not knowing the Way, they asked the Defunct the Road to *Edinburgh*, who refusing to shew it, and one of the Pannels expostulating with him, Why he treated a Stranger so, that came to serve the King? He uttered very disrespectful Words with respect to his Majesty; and one of the Pannels having called him Villain for such opprobrious Expressions, he came up to *Ross*, and with his Fist gave him a Blow on the Face, and then pulled him down to the Ground, and beat him with a great Stick, to the imminent Danger of his Life, saying, That he should never go alive out of his Hands: And *Roberts* having come to his Assistance, and rescued him a little; *Ross* the Pannel gave the Defunct a Wound with a Knife, whereof he died. *Ross* pleaded, There neither was nor could be forethought Felony, or premeditate Malice, against a Person whom he had never seen before: That it was committed upon Suddenty: That he had the highest Provocation, both verbal and real. Nevertheless by the Interlocutor, *Ross* the Pannel his giving the Wound was found relevant to infer the Pain of Death. And the Defence from Provocation by Words, and receiving a Blow on the Face, being pulled down to the Ground, and beat with a great Stick to the Danger of his Life, jointly sustained relevant to restrict the Libel to an arbitrary Punishment, was found to be elided by the Reply, That at the Time of giving the Wound to the Defunct, the Defunct's Hands were held by *Jaffrey Roberts* the other Pannel: From whence 'tis evident, that Slaughter upon Suddenty, *in rixa* or *chaud melle*, and by a Person who had received the greatest verbal and real Injuries, even beyond that of being thrown into a Kennel, of the Nature that is set forth into which the present Pannel was thrown, is by that Interlocutor found *homicidium dolosum*, and not *culposum*, but capital.

AND



AND in a very late Trial, in the Case of *Davidson* the Soldier, 'Slaughter upon the greatest Suddeny was sustained, and he was upon the Proof executed.

AND in the Judgment given in 1717, in the Case of *Brock* and *Lindsay*, determines this Point beyond all Dispute. These Pannels were accused of the Murder of one *Anderson*: And as the Libel did expressly set forth a Quarrel and a Struggling betwixt the two Pannels and the Defunct, which made it directly an *homicidium in rixa*; so the Pannels, at least *Lindsay*, offered a pretty strong Defence, namely, That the Defunct, without any Provocation, jostled them, and struck at *Lindsay*, and beat him down to the Ground; and it was while they were on the Ground that the Wound was given. And the Defence was pled for two several Purposes: *First*, That the Crime was not capital, because no forethought Felony. And *2dly*, To entitle them to the Act of Indemnity, under which all Homicides were included, except wilful Murder, and Slaughter of forethought Felony. And the Interlocutor upon the Relevancy was in thir Words, *Find the Pannels, or either of them, at the Place and Time libelled, their giving Archibald Anderson a Cut or Wound in the Neck or Throat, or other mortal Wound, with a Knife or other mortal Weapon, whereof he the Defunct soon thereafter died; or that the said Pannels, both or either of them, were Art and Part therein, relevant to infer the Pains of Death, and other Pains libelled; And repell the baill Defences for the Pannel, excepting that Defence pled upon his Majesty's gracious Act of Indemnity; anent which the said Lords superseded to give their Judgment, till the Conclusion of the Probation, and Return of the Verdict.*

THIS then is an undoubted Authority, that Homicide may by the Law of Scotland infer the Pain of Death, though it be neither wilful Murder, properly so speaking, nor forethought Felony; otherwise the Court could not have found the Crime relevant to infer the Pains of Death, and at the same

same Time reserve the Consideration, Whether there was any forethought Felony, or not.

UPON this Interlocutor a Proof was adduced, and a Verdict returned, *finding* Lindsay, *one of the Pannels, guilty*; and yet the Court having resumed the Consideration of the Indemnity, found him entitled to the Benefit of it: That is in other Words, they found the Crime was neither voluntary Murder, nor Slaughter of forethought Felony. So that 'tis plain, had not the Indemnity intervened, *Lindsay* must have suffered Death for Killing, tho' there was no previous Design or Forethought.

AND an Interlocutor upon the Relevancy, much to the same purpose with the former one, was also pronounced 31st of August 1721, in the Case of *Samuel Matthews* a Soldier; where the Libel was found relevant to infer the Pain of Death, reserving the Consideration of another Act of Indemnity then pled for the Pannel.

It would be in vain, and lengthen a Paper already too long, to run through all the Decisions which shew, that neither the Drunkenness of the Pannel, nor Provocation given him, nor the Suddenty upon which the Fact was committed, can afford a Defence to the Pannel, to exculpate the Slaughter, or lessen the ordinary Punishment: And therefore the Pursuers shall leave the first Branch of the Defence with the Lords, with this Observation, That if it is really founded in Law, by looking into the Books of Adjournal, one would think our Law has hitherto been very ill understood.

2do, It was offered, what indeed is alone applicable in the present Case, " That if the Pannel intended only to wound or kill *Bridgeton*, and by Misadventure the deceased Earl of *Strathmore* was wounded, and of that Wound died, the *pœna ordinaria* was not to be inflicted. "

It was answered, That according to the Rules of the Civil Law, he who intending to kill one, kills another, is nevertheless subject to the *pœna ordinaria*; so *Julius Clarus* delivers



livers his Opinion in his *Recepte Sententie*, lib. 5. § *homicidium*, N. 6. where after having taken Notice, that the contrary was indeed the Opinion of some, adds, *Sed certè ego si casus contingeret, illi facerem caput amputari*. And the learned *Mattheus*, lib. 48. tit. de *Sicariis*, § 12. gives the same Opinion, observing that the Act is consummate, there is the *Animus* or Design of Killing, and Death: That it would be a ridiculous Defence, that the Pannel intended to steal the Goods of one Man, but happened to steal those of another; or against Adultery, that he intended to defile one Man's Wife, and happened to light upon that of another: And he thinks 'tis as unreasonable to hope for Safety from this Defence, that the Meaning was to kill one, but another received the Stroke, and died.

*VOET* in his Commentary agrees with them, lib. 48. tit. 8. n. 2. where he says that there is no Difference, *Sive Vulnerus in Titium directum ab eo declinatum, Mævio in proximo stanti lethale fuerit, sive denique occidatur qui cedis impediendæ causa, sese medium inter aggressorem & defendentem interposuerit: quia prævalet, quod principale est, nec error talis tollit aut occidendi animum, aut eadem lege Cornelia vindicandam*. And for this not only sounds upon the l. 18. § 3. & § ult. ff. de *injur.* and l. 5. § 1. ff. de *servo corrupto*; but adds the Authorities of *Farinacius*, quæst. 125. n. 156 & 157. as also, that of *Fachineus*, *Carpzovius* and *Berlichius*, and others. And this Opinion obviates the Defence, as put in its most favourable Light, which however would be of very delicate Proof, that the Defunct thrust himself between *Bridgeton* and the Pannel, and received the Stroke aimed at the other.

THE learned *Sandè*, lib. 5. tit. 9. defin. 6. which has this Title, *Qui alium pro alio occidit, nihilominus ordinaria, leg. Cornel. pœna afficiendus*, says, after agreeing that according to the Roman Law, such Error would not have excused the Murder, *Hæc sententia ubique usu obtinuit, & secundum*

*cundum eam, reus ad mortem condemnatus & decapitatus est.* 27th November, Anno 1621; and there alledges the Authority of *Gomesius, Emanuel, Soir, and Carolus Molinaus, Qui alios cumulat*, in his Book *ad consuetudines Parisienses*. And Sir George Mackenzie in his *Criminals*, tit. Murder, § 9. says, after stating the Question, *Yet I think he should die, seeing the Design of killing a Man, and not any particular Man, is Murder; and the Killer intended to deface GOD Almighty's Image, and to take from the King a Subject.*

'Tis nothing to the purpose, that some of the Authors who write upon the *Roman Law*, are of a different Opinion, in a Case not determin'd in Words by the Text, when the Bulk of the Commentators are of the other Side, the most recent and of greatest Authority; and when it appears to be received as a Rule by the Practice of Nations, that the ordinary Punishment should be inflicted. And it may not be improper to observe, that the Cases where Lawyers dissent from the received Opinion, are generally unjustifiable Homicide, that is, where the Bystander was killed, when the Killer intended to execute his purpose in lawful Defence, and not *in homicidio culposo*, which is the highest the Pannel's Case could possibly be pled upon Provocation, according to any Opinion delivered by the strongest Advocates for the Question the Pannel pleads.

THAT it is not always necessary, that the Intention should be directed towards the Mischief done, in order to inflict the Pain of Death, must be evident from looking to the xxi Chap. of *Exod.* and v. 22 and 23. where, *If a Woman with Child is hurt when Men are striving, and Mischief follow; Life is to be given for Life.* And the kind of Killing now in question was plainly such as, according to the Law of *Moses*, would not have entitl'd the Slayer to the Benefit of the City of Refuge: For though in the xix. Chap. of *Deuter.* v. 4. *Whoso killeth his Neighbour ignorantly whom he hated not*



*in Time past*, is said to be intitled to that Privilege; yet this is limited immediately with an Example of Manslaughter merely casual.

THE Procurators for the Pannel insisted, " That this kind  
" of Killing was intirely casual, beyond, and without the In-  
" tention of the Party: That in the Case of *Maffon* in the  
" Year 1674, *Burnet* of *Carlops*, and several others, where  
" it appeared there was no Intention to kill, the Punishment  
" was mitigated."

It was answered, That where from the Nature of the Weapon, and Means by which the Wound was given, taking all the Circumstances together, there was no Evidence or Presumption that the Pannel intended Death to any Person whatsoever; and the *Propositum* was neither proved, nor could be presumed, as in the Case of *Maffon*. And in that of *Burnet* of *Carlops*, where Persons having Swords, only struck with Staves, it was held as approaching towards a casual Homicide. But that can never be pretended when the Wound given as libelled was so clearly mortal, and the Instrument the most lethal; and the Decision of *Carlops*, even with that Difference, stands single in the Books of Adjournal.

It was further contended for the Pannel, " That as *animus occidendi*, and Death following, are admitted to be  
" necessary in order to inflict the highest Punishment; so as  
" from the Circumstances mentioned in Exculpation, 'tis evident there was no Intention against the Defunct: And it  
" cannot be known whether the Pannel's Design was to kill  
" *Bridgeton*, since he was not killed, or if the Wound would  
" have been mortal, had the Sword reached him; and consequently the necessary Requisites to constitute a Murder,  
" were not to be found here."

It was answered, That the Invasion with a mortal Weapon with which the Defunct was killed, was a sufficient Proof in Law that the Invader intended to kill, since Death followed; and that there is no wounding by Measure, and  
Certainty

Certainty not to kill. The Act implies *Dolus* and *Malice* which, with Death following, makes Murder, without any further Proof of an Act of the Will to kill; and there would have been as little Evidence that the Pannel intended to kill *Bridgeton*, if he had actually received the Wound and died, because it was possible the Sword might have pierced further than he intended; and if he did not design to kill *Bridgeton*, and killed the Defunct, he must have been the Person against whom the Mischief was directed. As indeed it may be argued from the Rage and Drunkennells pled in Excuse and Defence, 'tis possible that *ex rabie* he intended to kill whomever he met with; and if Rage from Passion and Drink is allowed to palliate Murder, 'tis impossible any one can be safe. And these very Circumstances, without which the Defence has not a Colour, must at the same Time give Evidence, that the Pannel's Intention of pursuing *Bridgeton* with a Sword, was to kill and destroy him; for he pleads them to excuse his killing of the Defunct, as sufficient Provocations to incite him to it.

THE Law of *England* was frequently mentioned by the Procurators for the Pannel in the Pleading, as what would justify the Arguments brought for them; and particularly it was said, "That all Killing of a Suddenty by that Law, was only Manslaughter, and not Murder." But the contrary will appear by looking into *Hawkin's Pleas of the Crown, Book 1. Chap. 31. of Murder*, where he clearly distinguishes between deliberate Murder, and Murder committed on a sudden: And in this last Case, Malice prepensed is by the Law of *England* often implied, as Lord Chief Justice *Keyling* lays it down in his *Reports, Pag. 127. Regina versus Magrige*, and justifies it by the Case of *Holloway*, who espying a Boy that came to cut Wood, took him and tied him to an Horse's Tail with a Cord, and then gave the Horse two Blows, whereby he run away, and broke the Boy's Shoulder, whereof he died; which must have been sudden, and was adjudged



Murder. And *Pag. 130.* he supposes *A.* to have been provoked by *B.* and to have drawn his Sword and made a Pass at him, when *B.* had no Weapon drawn, but mis'd him: Thereupon *B.* draws his Sword, and passes at *A.* and there being Interchange of Passes between them, *A.* kills *B.* *I hold,* says the Author, *this to be Murder in A. for A's Pass at B. was malicious, and what B. afterwards did was lawful.* Here is both Suddenty and Provocation, and yet in the Opinion of that great Lawyer, it would have been held Murder. And in the present Question, neither *Bridgeton* nor the Deceast had any Weapon drawn.

AND to shew, that according to the Law of *England*, the aiming at one, and hitting another, does not make Death following Manslaughter; in the End of the next *Page* he sets down the Case of *Dr. Williams a Welshman*, who having a Leek in his Hat upon *St. David's Day*, a certain Person pointed to a Jack of Lent that hung up hard by, and said to him, *Look upon your Countryman!* At which *Dr. Williams* being enraged, took a Hammer that lay upon a Stall hard by, and flung at him, which hit another, and killed him: And tho' being indicted upon the Statute of Stabbing, it was resolved he was not within that Statute, because of the kind of Weapon; *Tet,* says the Author, *if the Indictment had been for Murder, I do think that the Welshman ought to have been convicted thereof.*

AND since the Pannel's Procurators insisted so much upon the Law of *England*, the Pursuers can't but mention the Authority of one of those Lawyers, as to one of the Cases they themselves stated in the Debate, *Hawkin's Pleas of the Crown, Chap. 31. Pag. 83. in fin.* The Case is, That a Person shooting at tame Fowls with intent to steal them, accidentally kills a Man; that Author says, *That it is agreed it would be Murder, and not Manslaughter.*

'Tis true indeed, that it would appear by the Law of *England*, as laid down in these Reports, that if there is Provocation,

action, in some particular Cases, sufficient to alleviate the Act of Killing, it reduces it to a bare Homicide: But then no Provocation from Words is ever sustained, nor even Assaults, but upon this Ground, That he who was affronted or assaulted, might reasonably apprehend, that he that treated him in that manner might have some further Design upon him, which resolves the Matter into a kind of Self-defence; and in this the Law of *England* differs from the Law of *Scotland*, which requires, in order to lawful Defence, and killing under the Notion of Danger from the Assailant, *ut quis sit constitutus in periculo vite*. But then there is no Pretence of apprehending dangerous Consequences, when the Party killed, or intended to be killed, was flying, and had no Weapon, as in this Case, and the Passion in such Circumstances resolves it self simply into Revenge, which no Law ever sustained to alleviate or palliate Murder; for there the Malice prepened is clear and evident.

But then, if it be considered in the present Case, that the Party affronting or invading, is not only set forth to have fled, and to have had no Weapon in his Hand, but that he escaped; What colour is there, upon these Principles, to alleviate the killing of a Person interposing to prevent the Mischief, when there was no Resistance upon the Part of any Person whatsoever, as in the Case of a Combate, and where it was voluntary as to the Person giving the Wound, in regard he could have stopt when *Bridgeton* fled, which cannot be said with regard to the *Welshman* who threw the Hammer?

To conclude this Matter, It appears pretty evident, that by the Law of *Scotland* the Circumstances offered in Exculpation afford, by the Law and Practice of *Scotland*, no relevant Defence: suppose the Person killed had been the Provoker, much less in the Case where the Person killed generously interposed to prevent the Mischief, having given no Colour or Cause of Provocation, having no Weapon, and where the  
 Person,



Person, against whom the Invasion is said to be meant, was without drawn Sword and flying: The Murder in these Circumstances must have proceeded either from Rage and Revenge, which no Law can ever favour, since Laws were made, and Judges appointed, that private Persons should not attempt judging in their own Case, and to bridle the unruly Passions of Men, or from set Purpose and Design to kill the Defunct, from former Resentment. And what adds to the Presumption of the last, is the Nature of the Wound, quite through the Body, and that the Sword went through the Back, lower than where it pierced the Belly; which excludes all possibility of pleading, that the Pannel's stumbling might have push'd it forward, because by the Nature of the Thing, had he stumbled after the Sword pierced the Defunct's Body, it must have raised the Point of the Sword, so that it could not have pierced lower in the Back than in the Belly.

UPON the *First* Branch of the Libel, the Pursuers think it unnecessary to open the particular Circumstances from which the Pannel's causeless Ill-will and Resentment may appear against the Defunct; that is matter of Evidence, and upon which no Interlocutor in the Relevancy can pass, and must ly in the Breast of the Assize: And against this Relevancy no Exception or colour of Exception can be pretended to ly. And as to the separate Relevancy, and *Art and Part*, what is offered to be proven, That the Defunct thrust himself in a manner upon the Pannel's Sword: As it is of too delicate Proof, and was repelled in the Case of *Hamilton of Green*, 'tis believed the Lords can have no Regard to it. And as for the Drunkenness and Provocation, especially where the Provocation is said to have been given by a third Party: If it were sustained, it must turn up what have been thought the Foundations of the Law of *Scotland*, and stand in Opposition to all the Practice that can be discovered from the Books of Adjournal. And the allowing such Defences as might possibly have some colour in the Law of *England*, to be proven, would

would be of dangerous Consequence in the Law of Scotland, where the Pursuers are tied up to a precise Relevancy: So that the Procedure in that part of the Island, in Trials of this kind, unless the whole Form of Trial were adopted in our Law, would open a Door for leaving Murders unpunish'd. The Law of Scotland alone can be the Rule in this Case; tho' at the same Time 'tis believ'd, that the *species facti*, as set forth by the Pannel, would be sufficient Warrant for a Verdict of Murder, even according to the Laws and Practice of England.

*In Respect whereof, &c.*

CHA. ARESKINE.

INFORMATION for James Carnegie  
of Finhaven, Pannel;

AGAINST

SUSANNA Countess of Strathmore, the Honourable  
Mr. JAMES LYON, Pursuers, and his Majesty's  
Advocate, for his Highness's Interest.

**T**HE said James Carnegie of Finhaven stands indicted before your Lordships of wilful and premeditate Murder and Homicide; in so far as, Having a causeless Ill-will and Resentment against the deceased Charles Earl of Strathmore, he conceived a deadly Hatred and Malice against him; and (on the Day libelled) did with a drawn Sword,



*Sword, without the least Colour or Cause of Provocation then given by him, invade the said deceased Earl, and did basely and feloniously murder and kill him, by giving him a Wound therewith in the Belly, whereof he soon after died. At least, At the Time and Place described, the said Charles Earl of Strathmore was, with a drawn Sword, feloniously and barbarously wounded, and died of the said Wound within a few Days thereafter; and that the Pannel was Art and Part in this Murder. And the Indictment concludes, By all which it is evident, That you are Guilty, Art and Part of the Crimes of wilful and premeditate Murder and Homicide, or one or other of them, at the Time and Place, and in the Manner above set forth.*

THE Pannel was brought to your Lordships Bar, upon the 15th of July current, to plead to this Indictment, where he appeared under that deep Melancholy and depressoire of Spirit with which a Man and Christian must be loaded, who finds himself accused, not only of shedding of Blood, but of shedding the Blood of one, whose personal Character and Qualities drew, from all who had the Honour to know him, the highest Esteem and Regard; and for whom the Pannel himself had all the Honour, intire Friendship, sincere Affection and high Respect, that either his Rank, personal Merit, or great Benevolence, could call for; and of having done this barbarously, from premeditated Malice, deadly Hatred, and Felony forethought.

YOUR Lordships having put the Question to him, in the ordinary way, What he said to the Indictment? He expressed himself in these Words;

My LORDS,

*I Find my self accused, by this Indictment, of maliciously murdering the Earl of Strathmore; but, as to any Ill-will, Malice or Design to hurt the Earl, GOD is my Witness, I had none: On the contrary, I had all the due Regard*

*Regard, Respect and Kindness for his Lordship, that I never had for any Man. I had the Misfortune that Day to be mortally drunk, for which I beg GOD's Pardon; so that, as I must answer at GOD's great Tribunal, I do not remember what happened, after I got the Affront your Lordships will hear of from my Lawyers. One Thing I am sure of, if it shall appear that I was the unlucky Person who wounded the Earl, I protest, before GOD, I would much rather that a Sword had been sheathed in my own Bowels. And further, I declare, That I do not so much as remember, that I saw the Earl after I came out of the Kennel, and even not so much as the drawing of my Sword; and therefore I cannot acknowledge the Libel, as it is libelled.*

FROM these Words so expressed, it is evident, in what a dismal Situation of Mind, this unhappy Gentleman must be. If what he hath said be true, he cannot be guilty of the malicious murdering the deceased Lord; yet he may have been the unhappy Instrument of his unfortunate Death; and what a bitter Reflection that must afford, all Circumstances, particularly that of Friendship, considered, will occur to every generous Man: It may produce Thoughts more afflicting than that of Death it self.

THE Council for the Pannel, in the Entry to the Debate, judged themselves under a Necessity, from the great Honour all of them had for the Person of the deceased Lord, and always will have for those who remain of his Family, and from the particular Obligations of Friendship, that some of them owed him in a more distinguished Manner, to declare, That if they had the least Apprehensions, that his Lordship's Death had happened by or from any Design or Intention of the Pannel against his Life, that no Motive, even of Relation or natural Tie to the Pannel, would have induced them to open their Mouth in his Defence; but that Innocence is always presumed, and that the Circumstances, so far as yet appears,



seem to set forth the Action as a *Fatality*, and not a *Design*, Justice and Duty called upon them to give their weak Assistance, until the Matter appeared in another Light.

THE Fact, as laid in the Libel, is in very general Terms, and those Circumstances from which the Nature of the Action falls to be determined, and which are material for the Pannel's Defence, being intirely omitted, the Procurators for the Pannel were obliged to set forth the Case as it truly happened, according to the Information given them; which, by our Law and Form, they are enabled to do, without owning the Libel, or admitting even those Facts, which in the Recital, according to Information, they are led to narrate: And the Account given of it was,

THAT on the 9th of May last, The deceased Earl of Strathmore, the Pannel, and several others, were called to be present at the Funerals of a Daughter of Patrick Carnegie of Loures, a near Relation of the Pannel's: That they din'd together at the Gentleman's House, where they drank a good Deal, all in Friendship and Familiarity, without the least Appearance of Quarrel or Difference. That after the burying was over, they, together with the Lord Roseshull, Mr. Thomas Lyon, and Mr. Lyon of Bridgeton, and other Gentlemen, went to one Clerk Dickson's, a Tavern in Forfar, where they drank pretty plentifully, and where the Pannel happened to be overtaken with too much Liguor. That all this while, nothing but Friendship appeared betwixt the deceased Earl and the Pannel; but, that Bridgeton was from Time to Time bearing hard upon the Pannel; and by the whole Tenor of his Conversation, endeavouring to fret or affront him.

AFTER this, the Pannel waited on the Lord Strathmore, at the Lady Auchterhouse's, where his Lordship went to visit, and Bridgeton followed them thither, and in that House began the former Way of Conversation, making the Pannel's Family-concerns the Subject of his Discourse, in

the

the most provoking Manner, asking him in a jibing Way, to supply a Lord in the Company with Money, pulling him rudely by the Breast, and gripping him by the Wrist, and striking his Hand against the Table, telling him, he must give that Lord such a Sum at that Time; then insisting, That he should give him the Choice of his Daughters; and still gripping him, and dashing his Hand in the foresaid rude Manner, told him, he would have him promise to do so; and asking him in an insolent Way, what, would he not do it? Then telling him, if it were his Case if he refused, he would maul him, shaking his Hand in the Pannel's Face. After this, in a ridiculing Way, desiring him to settle his Estate in a certain Manner, since he had no Sons of his own; then upbraiding him with his Debt. All which, the Pannel bore with Patience, and endeavoured to ward off the Discourse, when Bridgeton still insisted in the most provoking Way. And that Bridgeton likewise used very great Rudeness to the Lady in whose House they were; particularly, when she in Civility offered him a Glass of Brandy, he, seeing the Pannel already overtaken with Drink, desired the Lady to give it to him her Brother; and upon her saying, that her Brother did not seem to want it at that Time, he gripp'd her by the Arm so rudely, as to make her complain, and swore by GOD, her Brother either should drink it, or she should drink it herself; and persisted in this Way of doing, till the Lord Strathmore thought it proper to break off the Visit, and so went out of the House.

THAT Finhaven and Bridgeton followed the Earl, and when they came to the Street, some Words pass'd, and Bridgeton used the Expression, God damn him, meaning the Pannel, and with that gripp'd him by the Breast, and pass'd him into a dirty Kennel two Foot deep, over Head and Ears, where, in the Condition he was, he might have been smothered, if a Servant of the Earl's had not helped him out, who at the same Time express'd his Indignation at the



action he had seen, by these Words address'd to Bridgeton: Sir, tho' you be a Gentleman, you are uncivil.

*THAT* Bridgeton, after having so flung the Pannel into the Kennel, leaving him there, walked forward: at the same Time turning about, and folding his Arms across his Breast, scornfully laugh'd at him in that Condition.

*THAT* the Pannel being helped out of the Kennel in Manner foresaid, immediately drew his Sword, and in a just Passion, pursued Bridgeton with a staggering Pace: And Bridgeton run towards the Earl of Strathmore, whose Back was then to him, and endeavour'd to pull out his Sword: at which Time the Pannel coming up with Bridgeton, made a Push at him: in which Instant the Earl turning hastily about, pusht off Bridgeton, and threw himself in the Way of the Sword, by which he received the fatal Wound.

THESE are the unlucky Circumstances of the Fact, as the Lawyers for the Pannel have been instructed to plead: And from it as so stated, the Defence insisted upon for the Pannel was, That the Act of Killing is not Murder, nor Capital, where there is no Malice nor Forethought against the Person kill'd, either prov'd to have been conceiv'd and retain'd at any Time preceeding the Act of Killing, or presumed from the Circumstances to have preceeded the Act immediately before the committing of it: But that in this Case, there is no antecedent Malice specified or libell'd: and therefore it must be taken for granted, that there was none. And as to presumed Malice immediately preceeding the Act, that the Circumstances intirely exclude that Presumption: first Because as the Fact is laid, any Blow or Push that was intended, was made at, and designed for Bridgeton, and not against the Earl of Strathmore: and since the *initium facti* is to be considered, as well as the Event, a Push begun and intended against Bridgeton, could never be the Foundation of a Presumption of Malice against the Lord Strathmore, the Person

Person kill'd, without which, the killing could not be capital, but in this Case was merely casual and accidental, it having happened by the Earl's unluckily turning about in the Time of the Pannel's very Act of pushing against *Bridgeton*, whereby the Earl received the fatal Wound. 2<sup>do</sup>. That the Pannel could never be more criminal in having killed the Earl of *Strathmore* by a thrust directed at *Bridgeton*, than he would have been if he had killed *Bridgeton* himself; but that so it was, That if he had killed *Bridgeton*, after the Provocation given in Manner above set forth, that it would have been constructed only as casual or culpable Homicide, without Forethought, because done *ex incontinenti*, & *ex subito impetu*, & *calore justæ iracundiæ*; yea, in some Measure in Self-defence, since the Pannel having been thrown into the Kennel, even to the Danger of being suffocated, he had Reason after that to expect the worst from *Bridgeton*, since no Gentleman will throw another into a Puddle, who is not supposed to be ready to go further, as he cannot but expect the strongest Retortion of the Injury; and that the Pannel had the more Reason to think so, that *Bridgeton* immediately betook himself to the Earl of *Strathmore's* Sword, and endeavoured to pull it out, having none of his own, by Reason that the known Ferocity of his Character and Behaviour, is such, that the Country Gentlemen of his Acquaintance, decline to keep Company with him, if he wear any Arms: In such Case the Pannel was to expect the worst, and so was in some Measure in his own Defence, altho he may have exceeded the *moderamen inculpatae tutelæ*; which Excess in such Circumstances, would not be punishable by Death, but only by an arbitrary Punishment.

AND in Support of this Defence, the Council for the Pannel shall now, in this Information, endeavour, tho somewhat out of the Order of their Pleading, to follow the Information given in for the Pursuers. And *first*, To show your



your Lordships, that Killing in such Circumstances was not capital by the Divine Law, or Law of *Moses*. 2<sup>do</sup>. That it was not capital by the common Law, which we in great Measure follow in Matters of that kind. 3<sup>do</sup>. That it was not capital by our own ancient Law. 4<sup>to</sup>. That our ancient Law in that particular is not altered by the Statute of *Charles II.* 5<sup>to</sup>. That the Practice of the Court is not inconsistent, but agreeable to what is here pled. And 6<sup>to</sup>. That the Laws of our neighbouring Nations are for most part consonant to those Principles, as well as the Judgment of foreign Courts.

AND to begin with the Divine Law, it may be divided in two: *First*, the Law of Nature, which is the first of all Laws, and hath no other Author than God Almighty himself. 2<sup>do</sup>. His Will revealed by Writing, particularly in the Laws delivered by *Moses*.

AND as to the Law of Nature, one of the first Principles seems to be, That every Action must be construed and regulated from the Intention of the Actor. Every Action whatever, except in so far as it is conjoined with the Will and Intention of the Agent, differs in nothing from the Action of an irrational Creature; yea, if we may so speak, as to call the Operation or Impulse of an inanimate Creature an Action, the Actions of Man separated from his Intention and Design as a rational Creature, differ in nothing from the Actions of Brutes, or the Impulse of things inanimate; and consequently that Action, be what it will, can neither be Crime nor Virtue; it is a mere Impulse or Motion, not properly subject to Laws or Rules. But then indeed, when it comes to be conjoined with the Intention, or, which is the same thing, considered as the Action of a rational Agent, there it comes to be subject to Laws, to be considered as criminal or virtuous: Or if it appear to be accidental, so as to have depended upon no Will nor Deliberation of Reason, then it returns to be of the Nature of the Act of an irrational

nial Creature, or inanimate Substance; and is subjected to no Penalty, nor yet capable of receiving a Reward. The plain Consequence of which is, That it is the *Animus* alone that determines the Nature of the Act; and if the *Animus* or Intention was criminal, then, by the Law of Nature, the Action itself amounts to a Crime. On the other hand, If it be good and virtuous, the Act is laudable by the Law of Nature, supposing even a bad Consequence should follow. But in the *Third Place*, If the Action truly arise from no Intention or Principle governing that Action, it is neither laudable nor punishable, it returns to be of the Kind already mentioned, the same with the like Act of an irrational Creature, or the Impulse of an inanimate Substance, moved by a Cause extrinsec to itself. And the Consequence of all this is, that by the primary Law of Nature, the Intention must make the Crime; and therefore if there appear no Intention to commit that particular Fact which happens to be complained of, it is not a Crime, notwithstanding of a bad Consequence; it is considered as a Fatality.

And the Application is plain to the present Argument, That if the unfortunate Act of killing the deceased Lord did not flow from any Intention to him directed; then that Act is not by the Law of Nature a criminal Act, however the antecedent Acts directed against another may be criminal. It is another Question, how far a rational Agent, *versans in illicito*, is bound for Consequences that did not fall under his Intention? We shall afterwards endeavour to shew, that that is neither a Question in the Law of Nature, nor in the Divine Law; but is a Question arising from the Municipal Laws of particular Kingdoms, or at farthest from the Law of Nations, sometimes called the *Secondary Law of Nature*.

As this Point, That the Intention directed towards the Act committed, must govern the Action, so as to render it criminal or not, according to the first Principles of the Law of Nature, seems to be pretty plain, if we retire our Thoughts

from



from other after Laws; so indeed it is confirmed and illustrated by the written Law of God, as delivered by *Moses*, with Regard particularly to the Question of Manlaughter. It is almost unnecessary to observe, that whether the Remedy against the penal Consequences of Actions, committed without Intention, was in Form of an Absolvitor upon the Trial, or by having Access to a City of Refuge; it is the same thing: The Question is, What was to be the Punishment that was to take Effect? If the Punishment was to be stopt in that Form, by flying into a City of Refuge, the Principle of Law is the same, as if the Effect had been to be stopt in any other way. And just so, as we will afterwards have occasion to notice, it is the same thing as to our Law, whether the Manslayer was to be safe, by flying into Gyrth or Sanctuary, according to the old Law, or now to be safe by a judicial Absolvitor or Restriction of the Punishment. And just so with Regard to the Law of neighbouring Nations; it is all one, whether a Man is to be freed by Benefit of Clergy, or such other Form, if he is to be free. The Foundation Question is only, What was the Punishment that necessarily, *cum effectu*, falls to be inflicted upon a Homicide of such or such a kind; and, as in this Case, upon a Homicide committed without Forethought or malicious Intention directed against the Person that hath suffered? And therefore if by the *Mosaick* Law one in the Pannel's Circumstances was to have the Benefit of a City of Refuge; the Argument concludes, that by that Law he would not have been subjected to the Pain of Death. Indeed we believe we will be able to go a little further to shew your Lordships, that according to the Opinion of the most learned Interpreters and Doctors of the *Jewish* Law, the Benefit of the City of Refuge was scarce necessary in such a Case as that which is now before you.

In the xix. Chap. of *Deuteron*, the Cities of Refuge are appointed to be separated in the midst of the Land, that every Slayer may fly thither: *And this is the Case* (says the Text)

Text) of the Slayer, which shall fly thither, that he may live: Whoso killeth his Neighbour ignorantly, whom he hated not in Time past; or, as it is said to be more literally in the Original, *from yesterday the third Day*. By this Text your Lordships see those two are conjoin'd as explication of one another, *Ignorantly, whom he hated not in Time past*; and so the Word *Ignorantly* is put in Opposition to *Hatred in Time past*, and by that means the Sense is plain, that by *Ignorantly* is not meant, without knowing that he kills his Neighbour, but without a Foreknowledge, a Foresight, a former Ratiocination and Design: In which Sense, Knowledge is most frequently taken, because it is impossible to maintain, that if a Man ignorantly kill his Neighbour, even whom he hated before, taking the Word *Ignorantly* in that Sense, of his not knowing that he kills him, or killing him by mere Accident, without his Knowledge, can be liable as a Murderer, because it is impossible to conjoin even previous Enmity with accidental ignorant killing, so as to make out a Crime of Murder; that were exceeding inconsistent with every Principle of Reason, far more with a Law flowing from infinite Perfection. But then the Matter is fully explain'd by *v. 11.* of that same Chapter, which determines when a Man is not to have the Benefit of the City of Refuge; *But if any Man hate his Neighbour, and ly in wait for him, and rise up against him, and smite him mortally that he die, and flee into one of these Citres: then the Elders of his City shall send and fetch him thence, and deliver him into the Hand of the Avenger of Blood, that he may die.* Here are both Sides of the Question put, the one fully to explain the other; the last to explain what is meant by *Ignorantly, whom he hated not in Time past*. The last Text does by no means say, that if a Man smites his Neighbour whom he knoweth, although without Hatred, and without lying in wait, and without rising up against him, that he shall surely die; but on the contrary, puts the Issue of his dying upon

F

his



his hating of him whom he killed; and upon his rising up against him whom he did kill; and upon his lying in wait; that is, in other Words, upon his designing to take his Opportunity from a premeditated Malice: For indeed the Meaning cannot be that of a formal lying in wait, or lurking in a Passage where the Person was to pass; but he who designs the Thing, and takes his Opportunity, lyes in wait, in the plain Sense of the Text. Besides, the Word *Ignorantly* very plainly imports, and carries under it that Case of a Man's killing by Misadventure one whom he did not intend to kill, that is plainly Ignorance as to him who was killed; and yet it will be true, that if he designedly kill one in Place of another, mistaking the Person, but designing to kill that Person, as supposed to be the other, he does not ignorantly kill the Man whom he does slay, he kills him knowingly, altho' he mistake the Man.

Nor is it of any Importance, that the Examples immediately subjoined in the 5th y. are Instances of Slaughter entirely accidental; and where the Slayer did really not know that he killed, that is an Example, but not an Example exhausting the Rule, which the 11th y. fully clears, as not extending the capital Punishment to all who came not under the Description in the 5th y. but to those alone who *hated their Neighbour, lay in wait for him, and rose up against him.*

And tho' this is plain enough from that Part of the Law, yet the Matter is indeed more fully explained in the xxxv. Chap. of *Numb.* where there is another Ordinance as to Cities of Refuge, and they are appointed to be Six; and the general Rule is set down, *That every one that kills any Person unawares, may fly to those Cities.* Nothing can be plainer than the Meaning of killing unawares, that is without Deliberation, unexpectedly, without Forethought, *ex improviso, ex inconsulto*: These are all synonymous, and according to the *Septuagint* Translation so renders the Words.

*accusation*, that is, *involuntarily*; and so likewise the *Jewish* Doctors have explained it, as will afterwards be noticed.

AFTER this the Text goes on with an Enlargement or Ampliation of that general Law, *And if he smite him with an Instrument of Iron (so that he die) he is a Murderer, &c. And if he smite him with throwing a Stone (wherewith he may die) and he die, he is a Murderer, &c. Or if he smite him with an Hand-weapon of Wood (wherewith he may die) and he die, he is a Murderer.* These are the Ampliations; but then follows the Limitation in the 20th v. *But if he thrust him of Hatred, or hurt at him by lying of wait, that he die; or in Enmity smite him with his Hand, that he die: he that smote him shall surely be put to Death; for he is a Murderer, &c.* Here is the Limitation, he that killeth or thrusteth with an Iron-weapon, is a Murderer, under the Limitation introduced by the Particle *but*, as an explicatory Exception to the Generality of the Rule, *but if he thrust him with Hatred*; that is in other Words, that he is a Murderer, if he thrust him in Hatred: And therefore Commentators refer from this Text to the other in *Deuteronomy*, already cited for Explication of this, where it is statuted, *That if a Man hate his Neighbour, and rise up against him, and smite him; whereby they plainly understand, thrusting him of Hatred, as the same with rising up against him, and smiting him with Hatred, so as to comprehend every manner of killing with any Weapon; and consequently that this is not a distinct manner of killing, from what is expressed in the 16th v. but a Quality adjoined to the manner of killing, so as to make it capital, viz. That it must be done in Hatred.* And this is yet more clearly explained by the 22d and following Verses, where the Opposition is stated betwixt thrusting suddenly and of Enmity, with a direct Reference to the 16, 17 and 18 v. *But if he thrust him suddenly without Enmity, or have cast upon him any Thing, without laying of wait; or with any Stone wherewith a Man may die, see-*



ing him not, and cast it upon him that he die, and was not his Enemy, neither sought his Harm: then the Congregation shall judge, &c. and shall deliver the Slayer out of the Hand of the Avenger of Blood. There all the three Methods of Killing before mentioned are referred to; thrusting, properly applicable to the killing with a Sword, but without Enmity; casting any Thing upon him, without lying in wait, or Forethought, or with any Stone, wherewith a Man may die, the very Thing expressed in the 17th *v.* and from which he is deem'd to be a Murderer; yet, if he was not his Enemy, neither sought his Harm, he is not a Murderer, he is not to die, but to be delivered from the Avenger of Blood. So that these three last Verses are a plain Limitation of all that went before; the Instrument, whatever it was, was to raise a Presumption, if a mortal one: But yet if it appear the Person was not *thrust*, or *hurled* at, or *smitten* in *Enmity*, &c. the Slayer was to be delivered from the Avenger of Blood.

NEITHER can it stumble your Lordships, that in the 22d *v.* are these Words, *Seeing him not*, as if this were one of the Requisites necessary for the Slayer's Safety, that he did not see the Man whom he thrust at, or killed with a Stone, tho' not done in Enmity: For, *First*, 'Tis impossible to imagine, that the Words, *seeing him not*, however they might refer to the Case of throwing a Stone, can have any Reference to the Words, *thrusting without Enmity*. How can a Man thrust at him whom he seeth not? or, How can he smite him whom he seeth not, in any proper sense of Smiting? And therefore 'tis plain that, as to the Thrusting, the only Limitation is, that it be done without Enmity. But, 2do, Your Lordships will observe, that the Word *Him* in that Sentence, *seeing him not*, is not at all in the Original; it is an Adjection of the Translators, and, as such, is distinguished in different Characters in any correct Editions of our Bibles, and indeed is an erroneous Adjection: The Words should

should be only *seeing not*; and perhaps the Translations ought not at all to be by the Participle *seeing*, but, according to the Idiom of the *Latin* Language, by an Adjective, such as, *improvidus, imprudens*, or the like; and, according to our Language, by a Substantive and Adverb, such as, *without Foresight*: And so the *Septuagint* does translate it in these Words, *οὐκ εἰδώς*, which, in our Language, is directly *without Foresight*, that is, without Premeditation or anterior Design to give the Stroke. And so the Sense comes out, That where a Thrust or Blow of that kind is given, without Enmity, Foresight and Premeditation; or, in other Words, *sine dolo*, that there Death was not to follow, but the Slayer to have the Benefit of the City of Refuge. And that the most ancient Lawyers, and *Jewish* Doctors themselves, have understood the Scope of the *Mosaick* Law to be such, is the next Point we are to endeavour to shew your Lordships.

AND in the *First* Place, We beg leave to refer to an ancient Treatise, called *Mosaicarum & Romanarum legum Collatio*, last published by the learned *Schulting*, with his own Notes upon it; in the first *Tit.* of which, *De homicidiis casu, V. voluntate, § 5.* are these Words, *Item de casualibus homicidiis Moyses legaliter dicit, Si autem non per inimicitias immiserit super eum aliquod vas non insidians, vel lapidem, quo moriatur, non per dolum* (your Lordships will please mark those last Words) *& ceciderit super eum, & mortuus fuerit, si neque inimicus ejus, &c. liberabitur percussorem.* Here is directly set down, in way of Paraphrase, the Sense of the 23d *vs.* of the xxxv. *Chap.* of *Numb.* before cited; and in Place of these Words, *seeing not*, the Paraphrase of this ancient Collater is express'd by these Words, *non per dolum*, which shews what Understanding he had of the Words, directly congruous to what we have above set down, and, as we apprehend, to the *Septuagint* Translation; and this Paraphrase the Annotator approves of as the just meaning of the Text.

BUT



But we beg Leave to give your Lordships another great Authority, who founds his Opinion upon the Notions of the Jewish Doctors, or rather sets forth what they all agreed on to be the Import of the Mosaic Law on this Head, and that is the great and learned Selden, in his Treatise, *De jure naturali & gentium, juxta disciplinam Hebraeorum, Lib. 4. Cap. 2.* The Title of which is, *De homicidio involuntario, seu quod casu factum sit errore.* There the learned Author takes Notice of all the Texts upon this Subject, and of the Jewish Doctors who had wrote upon it, whose Names we need not trouble your Lordships to repeat, but refer to the Quotations Selden makes. That learned Author takes Notice of three Sorts of Homicide, which he and the Jewish Doctors reckoned to be involuntary, according to the Mosaic Law, and not to be punished with Death: The First is, what is merely accidental. The Second is, where the Killing was not merely accidental, but as he expresses it, *prope accedens ad violentiam.* The Third we beg Leave to let down in his own Words, as coming up directly to our Case. *Tertia autem homicidii involuntarii species est, ubi qui aliam occidit ex errore quidem aut ignorantia, quae tamen prope accedit ad id quod spontaneum est seu voluntarium; veluti ubi quis alterum occidere volens, alterum factu aditerve perimit, aut ubi factu sive saxi sive teli in hominum Coetum, cujus nec ignarus qui jecerit, quis occisus; adeoque intervenerit culpa latissima. Ex tribus hisce homicidii involuntarii speciebus, nulla est quae morte ex Sententia forensi ordinaria, sive in Hebraeo aliove Circumciso, sive in proselyto domicilii, aut Gentili alio puniretur. Nam in universum pronunciant, homicidam nullum, seu qui non sponte scelus patravet, sic foro puniendum.* Yea, he goes further, That in this last Case, according to the Jewish Doctors Opinion, there was no need of going to the City of Refuge, for that the Avenger of Blood had not a Power in that Case to kill.

We apprehend, nothing can be more direct or strong to the present Case, than that Authority, which is laid down, as the universal Opinion of the *Jewish* Doctors, which we hope does deserve some Regard in the Interpretation of the *Mosaic* Law.

AND this naturally leads us further to observe to your Lordships what we insinuated before, that the Question started by *Roman* and *Modern* Lawyers, how far a Person that intends to kill one Man, is liable to the Pain of Death if he kill another? hath no Foundation in the *Mosaic* Law, either from the Texts, or the Opinion of those *Jewish* Doctors. As to the *Last* your Lordships see, that *Sabden* from them, directly states the Case, *ubi quis alterum occidere volens, alterum jactu aliterve perimit*; and he and they determine that to be an involuntary Homicide, not punishable with Death; and we apprehend, that in this they are founded, in the Words of all the Texts. *If any Man hate his Neighbour, and lie in wait for him, and rise up against him, and smite him mortally, that he die*: Not one Word here of rising up against one, and killing another; not a Word of hating one, and in Consequence of that Hatred killing another. That was a Case which did not fall under that Law. The Hatred and the rising up, was by that Law, to be against the Man who was killed; if another by Fatality happen to be killed, that was a different Case, it was an involuntary Homicide; the Crime there was not the Killing, but stood upon the rising up against him who was not killed; and so the Punishment was for Invasion, but not for Killing. The Texts in the Book of *Numbers* are all to the same Purpose: *If he smite him who is killed of Hatred, or but beat him by laying of wait that he die, or in Enmity smite with his Hand that he die*. &c. where all the Rules are still directed towards the Person alone that is killed; and that of killing another, when the Stroke was not designed at him, is quite left out of the Case. And the Application of this Reasoning to the present



present unhappy Accident, is too evident to need Enlargement. If it appear that the Push was aimed at *Bridgeton*, that the Enmity was against him, and not against the deceased Lord; then, whatever be the Constitution of the *Roman*, or more modern Laws, the present Case is quite out of the Description of the *Mosaic* Law, concerning this Article of Manlaughter.

WHAT hath been already said at so great length, does fully obviate what is offered in the Pursuers Information in way of Answer. It is true, that the general Rule in the Divine Law is, *That whose sheddeth Man's Blood, by Man shall his Blood be shed*; and so by the sixth Commandment, the Prohibition is general, *Thou shalt not kill*: Yet even the Commandment it self admits of Exceptions; such as, killing in Self defence, and killing in Execution of Justice, and killing in Prosecution of just War, and the like. The other Rule likewise admits of Exceptions, not so as entirely to justify the Killing, and to make the Act lawful, but yet so as to excuse from the Pain of Death. The Texts already noticed are express, that a Man's Blood may be shed, and yet the Blood of the Shedder not be required on that Account. The Question is, Whether this misfortunate Pannel's Case comes not under the Exceptions? And that we have already discussed.

THE Position, "That by the Law of *Moses*, Death of a Suddenry was plainly capital, and that the Slayer had the Benefit of the City of Refuge, only where the Slaughter was by mere Misfortune," is assumed without sufficient Foundation. 'Tis plain, that he who thrusts without Enmity, does not kill the Man by mere Casualty: The Act from which Death follows, is a voluntary Act, altho' without Enmity: And altho' the Killing is involuntary, and so can never be said to be merely casual in the Sense the Pursuers would take the Words; neither are the Words in *Exodus*, *If a Man ly not in wait, but GOD deliver him into his Hand,*

*Hand*, in the least contrary to what hath been advanced: For it is most properly said, that where the Act is without the Design of the Killer, without Enmity, and without Hatred; that there, in so far as concerns the Killing, God hath delivered the Man into the Hand of the Slayer. The plain Meaning is, That where a Man is killed, not with Design, but that the Thing happens by the over-ruling Hand of Providence, permitting Things of that kind, in his sovereign Wisdom, and from his supreme Power; that there the Person is delivered to Death by the over-ruling Hand of God. And where could ever this be more properly applied, than on the present melancholly Occasion, when the providential turning about of the unfortunate deceased Lord, occasioned his receiving the fatal Wound?

It is likewise a Position assumed without Reason, "That  
" wherever a Man was killed by a mortal Weapon, that was  
" Murder by the *Mosaick* Law." We hope we have already demonstrated the contrary. If Enmity and Forethought was required, (and we need only repete that one Text, which expresses the killing a Man with a Stone, wherewith he may die) There the Text declares the Stone to be a mortal Weapon; yet for all that, in case of the Circumstances mentioned in the other Verse, the Slayer was not to die, but to be delivered from the Avenger of Blood: And this single Consideration must be sufficient to refute such a Position. Is it not possible for a Man to use a mortal Weapon, where there is no Enmity, nor Design to kill the Person who is slain? If it be possible, as it certainly is, then can we imagine that a Law, so perfect as the Divine Law it self, could make a Man guilty of Murder, because of the Use of such a Weapon, where he really intended no more Harm, than a Man that used a Weapon of another kind? Besides, that in truth every Weapon is a mortal Weapon with which a Man may be killed: And therefore, to imagine that the Divine Law laid such a Difference betwixt an Instrument of Iron, and one of another



ther kind, is certainly to go too far. The Law of God has put the Matter upon a much juster Footing, to wit, the Intention of the Person; which alone can distinguish his Actions.

THE Purifiers also say, "That tho' the Argument is good, That wherever the Benefit of the City of Refuge was not competent, there the Crime was capital; yet it does not follow, that where the Power of the Laws were suspended by the *jur assyli*, that the Punishment is not to be capital in a Country where the *jur assyli* takes no Place?"

BUT with Submission, this is no solid way of arguing. The Question hitherto treated is, What was the Law of *Moses*, with regard to Punishments in the case of Manslaughter? If the Punishment in any case was not capital, because of the Privilege of the *Asylum*, the Conclusion is just, That the All-wise God did not intend such Punishments should be inflicted for such an Offence, and the Form of granting the Protection from the Punishment, does not alter the Substance of the Law.

THE Next Point undertaken to be illustrated is, That Manslaughter, under such Circumstances as occur in the present Case, was not by the Common Law punishable by Death: And this Argument must indeed be divided into several Branches, such as, *1mo*, That culpable Homicide was not so punishable, and that Homicide committed upon such high Provocation, as was here given by *Bridgeton*, could amount to culpable Homicide only. *2do*, That by that Law, the deceased Lord not having been intended to be killed, but the Invasion, whatever it was, intended against another; the killing the Earl was casual, or at worst culpable, not punishable with Death.

AND as to the *First* of these Points, we shall not trouble your Lordships with Infinity of Laws and Opinions of Lawyers that might be adduced upon the Point, but only take Notice of some of the most remarkable, and which seem most apposite

apposite to the present Case. And in the *First Place*, The Foundation of the *Roman Law* on this Point, appears to have been laid down as early as the Days of *Numa*: For the *Roman Writers* take Notice of a Law of his in these Words; *In Numæ legibus cautum est, ut si quis imprudens hominem occidisset, pro capite occisi & natis ejus in concione offerret arietem.* This Law is taken Notice of by *Pithæus*, in his Annotations upon the forecited ancient Treatise, comparing the *Mosaick* and *Roman Law*, with regard to this Head of Manslaughter, as agreeing precisely with the Law of *Moses*; and the plain Meaning of it is, That where a Man kills another, altho culpably, yet if it be *sine dolo per imprudentiam*, he is not to suffer Death, but to make an Assythment to the nearest Relations of the Person killed: And the same Treatise takes Notice of a Rescript of *Adrian's* to the same Purpose, directed to *Taurinus Ignatius*, approving of a Judgment given in the Case of one *Marius Evaristus*, whereby the Proconsul had mitigated the Punishment of Manslaughter upon that Ground, That suppose it was done *per lasciviam*, and culpably, yet it was *sine dolo*. The Words of the Rescript are, *Pœnam Marii Evaristi recte Ignate Taurine, moderatus es ad modum culpæ, refert enim, & in majoribus delictis consulto aliquod admittatur an casu; & sane in omnibus criminibus distinctio hæc pœnam aut justitiam provocare debet, aut temperamentum admittere.* And *Schulzing* in his Annotations, explains what is meant by *casu*, in these Words; *Per casum hic intelligitur fieri quod non fit dolo, quomodo & quod impetu fit, casu dicitur fieri. l. 1. § 3. ad leg. Corneli. de Siccar. Ubi pro causa, editiones veteres & glossam recte haberi casu certissimum est.* Which by the by, shows how erroneous the Pursuers Interpretation of the Words *casus* or *casualis*, when they would restrict them to what is done by mere Accident.

THE general Rules of the Civil Law are plain on this Point, That it is the *animus qui maleficia distinguit*; That



there can be no Murder, *sine animo occidendi*. But these general Topicks need not be insisted on, where the Texts themselves are so express, such as not only these already mentioned, but even that l. 1. § 3. *ad leg. Corn. de Siccar. Drouz Adrianus rescripsit, eum qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse.* And a little after, *Et ex re constituendum hoc, nam si gladium strixerit, & in eo percusserit: indubitate occidendi animo id eum admisisse.* But then he adds the Exception, *Sed si clavi percussit, aut cucuma in rixa: quamvis ferro percusserit, tamen non occidendi animo, leniendam pœnam ejus qui in rixa casu magis quam voluntate homicidium admisit.* It is true that the Pursuers, and indeed several of the Doctors, endeavour to turn this Text the other Way, by a plainly erroneous Interpretation and wrong pointing of the Text. They pretend, *That where a Wound is given by a Sword, there the animus is undoubtedly presumed;* and so far right as to the Rule. But then the Law sets down the Exceptions; *First, If the Stroke be clavi aut cucuma; suppose these be mortal Weapons wherewith a Man may die, yet because they are not Instruments expressly made for Death, the Presumption is, that aberat animus occidendi, unless Circumstances make it appear otherwise.* Then the *Second* Exception is *in rixa, quamvis ferro percusserit*, although a Man strike with a Sword, yet if it be *in rixa*, suddenly, or upon a Provocation given, *tamen non occidendi animo, leniendam pœnam*, because *in rixa, casu magis quam voluntate homicidium admisit*. Those Doctors indeed who go wrong in the Interpretation of this Text, pretend, That the Meaning of *quamvis ferro* is not, although he strike with a Sword, but would make the Meaning to be, *Although he struck with an Instrument of Iron*, and so make the Word *ferrum*, and also those Words *in rixa*, refer to other Words, *clave aut cucuma*; so as that the Sense should be, if a Man strike, *clave aut cucuma in rixa*, although these be Instruments of Iron, he

he is not presumed to have had the *animus occidendi*. But, with Submission, as both the learned *Noodt* and *Schulting*, observe upon that Law, the Interpretation is strained, and indeed illiterate: For the Word *ferrum* is never used in Law in that Sense, but always does signify a Sword; and so the Expression is the same, but ornately repeated in other Words, as if the Emperor had said, *In rixa quamvis gladio percussit*: And so the Sense is, that the *animus* is in general presumed from the using a Sword, that it is not presumed where the Instrument is not an Instrument made for Death; but if the Killing happen in *rixa*, the *animus* is not presumed, although the Stroke be given with a Sword.

AND this is likewise the Opinion of the learned *Grotius*, in his Annotations upon the Text in *Numbers* above cited, *Y. 16* which in the *Latin* Translation is rendred, *Si quis ferro percussit*, on which *Grotius* hath this Note, *Mus. Ebraeorum multis verbis rem circumloquitur. Sensus est; mortis esse pœnam qualicumque telo quis hominem occiderit. Ex telo presumitur malum concilium, nisi contrarium appareat.* There your Lordships see that Author's Opinion is as we plead; That the using a mortal Weapon presumes the Design, but not *presumptione juris* *§. de iurr.*; for he adds, *nisi contrarium appareat*.

THE Rescript of the Emperor *Antonine* is likewise as express on this Head as can be, *l. 1. Cod. de Siccar. Frater vester rectius fecerit, si se praesidi provinciae obtulerit. Qui si probaverit, non occidendi animo hominem à se percussum esse, remissa homicidii pœna, secundum disciplinam militarem sententiam proferet: crimen enim contrahitur, si voluntas nocendi intercedat, ceterum ea quæ ex improvise casu potius quam fraude accidunt, fati plerumque non noxæ imputantur.* Here the Emperor plainly sets down these two Things, *1st*, That *pœna homicidii est remittenda, si animus occidendi non habuerit.* *2do*, That where the Thing is done *ex improvise*, there there is no *animus*; that 'tis to be looked



looked upon as done *casu*, by Fatality, rather than Crime: But nevertheless, that in such a Case there may be an arbitrary Punishment.

THE Doctors of the *Roman Law* seem to be unanimous on this general Point. *Carpzovius*, one of the severest Criminalists, is most express upon it; *Cessat porro poena ordinaria homicidii, si culpa vel casu fuisset commissum homicidium*; and goes on, *quod adeo verum est, ut in homicidio lata culpa, dolo non equiparetur*. *Clarus* is likewise as express upon this general Head; and such Shoals of others are by them quoted and referred to, that it were vain to repeat their Names, or trouble your Lordships with quoting their Words. We don't know that any Lawyer of Reputation differs upon the general Point.

BUT then indeed the Question comes, What is culpable Homicide? And whether the present Case falls under that Description? which is next to be illustrated. And here we humbly insist, That where the Homicide is committed upon a sudden Quarrel, and Provocation given, especially by real Injury, and that Quarrel begun not by the Killer; that this is no more than culpable Homicide. And for this, in the First Place, we oppose the Law already cited, *in rixa quamvis ferro percusserit*. And to the same Purpose is the first Law, *S. 5. ff. ad senat. consult. Turpilianum*, the *l. 2. Cod. de abolit.* and the *S. 2. l. 16. de penis*; the Words of which we shall not trouble your Lordships with repeating, because they are the common Texts founded upon by Doctors on this Head. We have likewise for us the Authority of all the ancient moral Philosophers; such as, *Aristotle*, *Plato*, *Plutarch*, and many others, likewise commonly taken Notice of by the Lawyers on this Subject. It is true, some of the severest Criminalists, such as *Mattheus* and *Carpzovius*, don't admit the Rule in general, but still they admit as much as is necessary in the present Question: They don't allow, that where the Killer is *nactus rixae*, that he is at all to be excused, altho' the

the Killing happen in *calore iracundiae*; but then most of them do admit it, if the Killer be not the *author rixæ*, but be the Person provoked, to whom a just Provocation has been given, especially by a real Injury: And so particularly *Carp. xavins*, one of the severest, after he has argued at length against the general Point, concludes in his *Quæstio 6. §§ 14 and 16*, *Nihil quoque adversatur regula adducta, quod scilicet delictum ira commissum, mitius puniri soleat; quia hæc regula de ira ex justa causa proveniente accipienda est: duplex etenim ira est, alia ex justa causa provenit, quæ si non in capum, tamen ex parte excusat, ut delinquens mitius puniatur; alia verò non provenit ex justa causa, quæ in nihilo excusat.* Then he adds, *Hæc distinctio communiter recepta est ab interpretibus*, and cites severals. And then concludes, *Si ergo justa causa calorem iracundiae præcedat, veluti si quis ab alio fuerit provocatus, aut alio modo offensus, tunc is qui ira & intenso dolore permotus, provocantem seu offendentem interficit, absque dubio à pœna ordinaria liberabitur; secus verò si quis, absque justa & probabili causa iratus aliquem occidat, de quo casu nos hæc loquimur, qui pœna homicidii ordinariæ neutiquam est excusandus.* And then takes Notice, that the Practice in the Court of *Lipswick* is agreeable to this.

THERE is an adjudged Case very apposite, published in a Book, called, *Alphonso Villagut Neapolitani Consultationes Decisive*, very learnedly resolved. It is the *Decisio 29*. We shall state the Case in the Words of the Author, *Quidam nobilis Ragusinus fuisset verberatus, extra (sed prope) Ecclesiam Sanctæ Crucis Castri Gravase, à quodam alio nobili Ragusino, in eodem pacto evaginavit pugionem contra dictum verberantem, ac in fugam jam conversum & ipsum insequens, unico vulnere sibi inflicto in dicta Ecclesia (quam ille ingressus fuerat) dictam Ecclesiam egrediens sese in fugam dedit. & cum dictus verberator, ex dicto unico inflicto vulnere intra dictam Ecclesiam mortuus esset.* The Case



came to be tried, at least the Questions upon it, to be resolved by the said *Alphonsus*; where several Questions occurred, but those which are most applicable to the present Case are two: First, *An hujusmodi homicidium in Ecclesia perpetratum fuerat dicendum voluntarium nec ne, eo quod dictus nobilis insecutus fuisset illum jam cessantem à verberibus inferendis, ac sic unico vulnere inflicto interfecisset?* The Second Question is, *An dictus nobilis prædicto modo ac de causa violans dictam immunitatem Ecclesiasticam, veniat in foro seculari, & Ecclesiastico pœna ordinaria plectendus, vel solum mitiore pœna?* The Resolution upon the first Question is, That though at first View the Homicide might seem voluntary, *Eo quod dictus nobilis, nemine ipsum compellente, fugientem hominem vulneraverit, nihilominus nullo pacto fore judicandum homicidium voluntarium, aut pro tali dictum nobilem puniendum.* The Reasons for this Resolution are set down with great Learning and Judgment; but are so long, that 'tis impossible to repeat them: First, They are taken from the Definition of voluntary Homicide. 2do, From the Texts of the Roman Law, and the Opinion of Doctors. 3tio, From that Particular, that the Nobleman had been immediately struck before; on which the Words are remarkable, *Ex hoc ergo articulo, appertissime elicitur homicidium hujusmodi fuisse casuale, & non voluntarium, nam nulla mora interjacente, evaginato pugione, ipse nobilis baculo percussus insecutus fuit dictum percussorem jam fugientem, & hoc pro honoris proprii redemptione, ut sic se tuetur ab injuria corporali recepta ex verberibus:* After which follows a long Reasoning, all in the Pannel's Favour. And this Case we take the more notice of, because the Pursuers pretended to make a Distinction betwixt the Case of a Wound given the very Moment a real Injury is done, and the like given after the Injurer has desisted from beating, and retired to some Distance; but there is no Difference, except the Interval be so long, as it can be supposed the Thought of the Person injured

injured was cool. The other Question is likewise resolved in favour of the Accused; that in such a Case, not the ordinary Punishment, either Ecclesiastical or Civil, ought to take Place, but only the *pœna mitior*, and confirmed by very strong Reasons, which we cannot recite, but refer to *quod*

AMONGST other Authors that might be cited for supporting this Opinion, is the learned *Voet*, in the very Section cited by the Pursuers, *ad tit. ad leg. Com. de Sic. n. 9.* where after he has said what is cited for them, That one killing another who has provoked him only by a verbal or slight Injury, *vix est ut ab ordinaria pœna absolvendus sit*; he adds, That if the Provocation was by an atrocious real Injury, that would be sufficient to mitigate the ordinary Punishment; and to confirm that, cites *Matthæus, Berlichius, &c.* And the Reason given by these Authors for making this Allowance, in case of just Provocation, is express in these Words by *Gothofred, ad l. 17. d. t. Quod ei sit ignoscendum, qui provocatus se ulcisci voluit, quique justum dolorem profertur*;

AND indeed we apprehend this Opinion is founded in the first Principle of Nature; for scarce any humane Constancy can suffer such high real Injury, without the Passions being inflamed: And although Killing is no doubt an Excess in the Retortion of a real Injury, yet still it is but an Excess, and the Injury shews the Thing done without Design; and therefore, because of insuperable humane Weakness, the Punishment falls to be mitigated. And the Application to the present Case, as we apprehend, is obvious; *Bridgeton* had given the highest Provocation, not only by a Tract of verbal Injuries and Endeavours to pick a Quarrel, but had committed the most provoking real Injury, to throw a Gentleman over Head and Ears in a dirty Puddle, in the Middle of a Town, and Sight of so many On-lookers; no Injury could be more provoking. Yea indeed there was more in it than an Injury only: One that was able to throw the Pannel into the Puddle



In that manner, was likewise able to have suffocated him there; the Pannel had no Reason to expect otherwise, and therefore no wonder if he betook himself to his Sword. And the other Circumstance noticed, That *Bridgeton*, immediately upon the doing the Thing, endeavoured to draw, and make himself Master of my Lord *Strathmore's* Sword, gave the Pannel ground to expect the worst; and so it may be doubted, if he was obliged to wait till *Bridgeton* should have an Opportunity to give him the Blow, even with a mortal Weapon. And when this is considered, the Fact goes further than a Retortion of the highest Injury: The Pannel was in some measure put upon his Defence; and granting that his pushing at *Bridgeton* was an Excess, yet still that Excess falls only to be punished *pœna extraordinaria*.

ALL Lawyers distinguish Excesses of that sort into three Kinds, that of Time, Place, and Weapon that is used; and Excess in point of Time is punished even with Death, where the Interval is great; because that Interval presumes Fraud and Deliberation: But here was no Excess of Time; the Thing was done *ex incontinenti*, when the Injury was fresh and recent. There is likewise Excess in point of Place, when the Injurer is allowed to retire to a considerable Distance from the Place where the Injury is given; and this is in some measure coincident with the other, because it implies an Interval of Time: Yet if it be not great, the Lawyers hold it to be only punishable arbitrarily. And then the third is the Excess in the Use of the Weapon, where there is no Interval of Time or Place; and that is always agreed to be punishable only arbitrarily, where the Provocation is high.

FROM what is said it seems plain, that if *Bridgeton* had received the Thrust, the Homicide would have been culpable only; and so it remains to be considered, If the Case comes out worse for the Pannel, because it was my Lord *Strathmore* that received the Wound, and not *Bridgeton*. And we apprehend it does not, but on the contrary, that this gives a great Strength

to the Defence: And that because, *imo*, The Push being designed at *Bridgeton*, shows that there was no Malice at my Lord *Strathmore*, neither premeditated, nor presumed from the giving of the Wound: For admitting it to be true, that in an ordinary Case, the giving a Wound with a mortal Weapon presumes the Dole or malevolous Intention; yet that can never be, where the Push is pointed at another than him who by Fatality receives it. And so the Case comes out thus, That the Pannel in making one Push, could not design it at two Persons; and so if he designed it at *Bridgeton*, 'tis impossible to say he had a Design against my Lord *Strathmore*. It is plain in the Nature of the Thing, that the Design, though presumed from the giving the Wound, yet in point of Time it precedes the actual receiving of the Wound, although that Preceding or Precedence be but momentary; and therefore, if in the very Act of Pushing, the Design appears to have been against *Bridgeton*, it excludes all Pretence of any *animus* against another who received the Wound by Fatality, in the very Moment that the Design was pointed against the other.

AND here your Lordships will likewise observe, that there can be no *animus occidendi* presumed at all against any Man, not even against *Bridgeton* himself; because the drawing a Sword, and pushing at a Man with it, does not of it self presume a Design to kill the Man pushed at, except the Wound, and Death actually follow: For it is from the Event of the Wound, and Death following alone, that the Intention is presumed. Therefore since Death did not happen to *Bridgeton*, the Law cannot presume an Intention to kill him; since the Foundation of the Presumption is removed, or did not happen. If the Blow had miss'd him, or had not killed, but wounded him; the Intention would not be presumed: And therefore it cannot here be presumed, as the Case happened; for there is no such Presumption in Law, as that killing one presumes a Design to kill another; except where it appears that the Slayer killed one Man by mistake, taking him to be another: As



for Instance, killing *Caius* in the dark, when the Killer really believed him to be *Titius*; there indeed the killing of *Caius* presumes the Intention of killing *Titius*, although he was not actually slain: And therefore in that Case the Killer is indeed guilty of Murder. But 'tis quite another Case, where one Man is killed, not by mistake for another, but by Fatality, when the Push was intended at another, whom the Killer knew; which is the Case in hand. And therefore we do humbly insist, that it cannot be said there was an Intention to kill *Bridgeton*, since his Death did not follow. Neither can it be said there was an Intention to kill the Earl of *Strathmore*; because though his Death did most unluckily happen, yet the *initium*, upon which the Intention must be founded, did not happen, the Push being made at *Bridgeton*; for those two must always concur, the Push made at the Man who dies, and the actual Death: And where it happens otherwise, the Death is a mere Fatality; not intirely innocent, because the Killer was so far faulty in invading the other; but then it is no more than an Invasion; it is not Murder from Malice presumed. No Presumption of Law can get the better of contrary Evidence: The Presumption of Law may be, That where a Man is killed, he was intended to be killed: But if from the Circumstances the direct contrary appear, that there was not an Intention against him; this is Evidence which excludes the Presumption; and so there can be no Murder in the Case.

It is indeed a Case stated by the Lawyers, What should be the Consequence, if a Person intending to kill one Man, kill another? And we acknowledge they are greatly divided among themselves upon the Question; a great many of the ablest of them are in all Cases clear, that where one Man is killed, and another was designed, it cannot be Murder, because of the Want of an Intention against him. *Bartolus*, *Farinacius*, *Gomesius*, *Menochius*, and Numbers of others quoted by them, are plain in that Opinion, and give an Account of several Judgments of the Courts of *Mantua*, and *Naples*.

*Naples* and others, to that purpose; and *Farinacius* says that it is the common Opinion, *Et ab hac sententia in judicando non esse recedendum*. And however other Lawyers may seem to differ, yet in the *First* Place, The Divine Law, for any thing that can be found in it, is on this Side; because it plainly speaks only of hating him, and rising up against him who happens actually to be killed, and mentions no such Case as deserving Death, as this of rising up against one Man, and by Fatality killing another. *2do*, That this was the Opinion of the *Jewish* Doctors, is plain from the Quotation already brought from *Selden*, where this very Thing of killing one Man in place of another is made Part of the third Case stated of involuntary Homicide, and determined not to be capital: But *3tio*, Those Lawyers who at first View seem to differ, do really not differ, when the Cases are distinguished: For what they plainly mean, is only where a Man by mistake kills *Tizius*, believing him to be *Mevius*. This we admit is capital; for Reasons before given; but not the other of killing one by Fatality, not for another, but directing the Blow at the other.

BUT then your Lordships will observe, that all Lawyers agree in this, That wherever a Man is to suffer for killing one; when he intended to kill another; that can only be where the Forethought and dolose Intention to kill the other is certain; but not where the Invasion is *ex impetu*. And therefore supposing one invade another, with an Intention to hurt, or *percutere*, as the Lawyers call it, but without a certain Evidence that his thorough Intention was to kill; there supposing the Blow intended for one do kill another, the Killer can't suffer Death: And which by the by shows your Lordships, that there is no such Presumption in Law, as, That because the Push killed the Earl of *Strathmore*, therefore the Pannel intended to kill *Bridgeton*; for if that were Law, then the Question could never occur, but would be inoprt, Whether a Man intending to strike one, and killing another with that Blow, is guilty of Murder, or is presumed to have intended to kill that



that other at whom the Stroke was intended ? We shall trouble your Lordships only with two Authorities on this Point, which are very direct to the Case : The first is that of *Berlichius*, which we take rather notice, because he seems to be against us on the general Point ; after discussing which, he hath these Words, speaking of his own Opinion, *Fallit, si quis aliquem non occidere, sed percutere tantum, volens, alium præter intentionem percutiat ut moriatur.* From this your Lordships see, that it is no Consequence, That because the Thrust killed my Lord *Strathmore*, therefore it should be presumed the Pannel intended to kill *Bridgeton* : If that were true, that Lawyers Position, from whom no body differs, must be direct Nonsense. And therefore since there is no other Evidence of a further Intention against *Bridgeton* than *percutere*, except it arise from the Death of my Lord *Strathmore* ; and that his Death cannot presume it ; we are directly under the Position the Lawyer lays down, That though my Lord was unhappily killed, yet the Pannel ought not to suffer Death, where it does not appear that he intended to do more than to push at *Bridgeton* at random, *percutere*, without a certain Design to kill.

BUT this is yet more plainly laid down by another very distinct Lawyer, *Masurius Labeo*, in his Treatise called, *Homicida excusatus*, cap. 35. where treating of this very Question, he first notices, that if the Killer was *occupatus in re licita*, such as defending against any Aggressor, which in some Measure is the Case here, that then he is not liable, altho' he chance to kill a third Party : But then he goes further, *Aut etiam, ut amplius dicta extendamus, reus quantumvis in re illicita occupatus, tali tamen in casu constitutus fuit, ut si Caium interfecisset, non nisi culpæ reus futurus fuisset, e- jusque loco cum infelici fato Sempronius lethalem acceperit ictum, magis est, ut reus hoc ipso causam suam non gravasse censeretur : cum enim Caii interfectione mortem meritus non fuisset, certe imprudentia atque in facto error magis e-*

um à Sempronii deade excusare debet: atque Caius potius, si is vel rixæ auctor fuerit, vel iracundiam alterius iustam provocaverit, id quod inde secutum, imputandum reor. Here your Lordships see he is stating the Case of a rixæ; where one had given Provocation as Bridgeton did, he indeed supposes that in such a Case killing the Provoker ought not to infer Death; much less, says he, the accidental killing of a third Party: And your Lordships will observe he asserts further, That the Provoker, or auctor rixæ, is rather to be judged guilty of the Slaughter.

AND a little after, he comes yet closer to the present Case: *Quid si tamen Caium adversarium occidere nollet, sed illi tantum nocere, Sempronium autem imprudenter se ictui obficientem, eo ipso interemerit, tunc certe imprudentia Sempronii delictum rei aggravare non debet; si enim is moderatorem rixæ se non obtulisset, corpusque suum subito ex propinquo non objecisset, Caius à cadente forte remotior, non nisi vulnus aliave noxam inde reportasset, unde Sempronio mors oblata est: excusandus ergo à tanto merito percussor tunc, cum occidendi animus hic non adfuisse apparet.*

THIS is so apposite to the present Question, that one would think it were a Resolution on the Case: For by that your Lordships see, that notwithstanding one's being killed, the Author says it does not from thence appear, that there was an Intention to kill the other: The other, who, as being at a greater Distance, might not have been killed, might only have been hurt and wounded, although the Person that came unhappily in the Way happened to be killed. This is just what we have pled, That it does not appear there was an Intention to kill Bridgeton, because he might not have been killed, but he might only have been hurt or wounded; and therefore the Pannel ought not to suffer Death, because of the Fatality of killing the deceased Lord, *qui subito corpus suum ex propinquo objecit.* And upon all those Grounds, we humbly insist, That if Bridgeton had been killed, there would



would have been no Place for a capital Punishment : But then separately, whatever be in that, That since it does not appear, (nor cannot, since Death did not follow) that there was a certain Intention to kill him, the casual killing of the Earl of *Strathmore* can't be punishable with Death.

WHAT has been said, fully removes any Argument that may be drawn from Sir *George Mackenzie's* Opinion, " That he who by Mistake kills one for another, should die : " For your Lordships see, that he speaks only of that Case, when one Man is certainly intended to be killed, but another is killed by Mistake, being supposed to be him : That is not the Case now before your Lordships.

AND in this Question, concerning the Pannel's Intention and Design, the Circumstance of his being overtaken with Drink, is a Circumstance that assists in the Argument. We don't say, that being drunk, affords a Defence for Killing; nevertheless it is a Circumstance whereby to show, there was no Malice or Dole, especially against the Earl of *Strathmore*; since every body may conceive, how easy it is for a Man that is drunk, pushing at one, even to stagger upon another, or not to have the Judgment and Presence of Mind to draw back, when that other suddenly throws himself in the Way of the Thrust.

WHAT is laid down by the Pursuers, in opposition to all this, in their Information, is so fully obviated, that 'tis quite needless to repeat their Argument; only whereas they say, " That if Killing, notwithstanding of Provocation, had not been capital, it could not have been a Doubt in the Common Law, Whether a Husband ought to suffer Death, who killed his Wife taken in the Act of Adultery ? " But we apprehend, that the direct contrary Consequence follows, That if high Provocation had not afforded a Defence, then indeed there could not have been a Doubt, the Husband must have died, because high Provocation was all he had to plead: But the Doubt was, Whether a Provocation of that kind, where

where there was no real corporal Injury to the Husband himself, was sufficient? And the Law determines that it was; and consequently establishes the Rule, That high and grievous Provocations ought to alleviate the Punishment.

THE Brocard, That *versans in re illicita tenetur de omni eventu*, affords no Argument against the Pannel in this Case; nor indeed hath it been much insisted on by the Pursuers. *First*, It is not true in many Cases. But *2do*, It holds in no Case, except with regard to Consequences or Events, that happen with regard to that Subject, or Object against whom, or which the unlawful Act is directed: As for Instance, If one sets Fire to a House, he is guilty of Murder, if a Person happen to be burnt in that House; or if he undermine a House, he is liable for all the Goods that may be destroyed by its Fall; but he is not liable for any extrinseck Damage, that may happen to another Subject casually and by Accident: And therefore, suppose it were proved, that one unlawfully invading another, without a Design to kill, might in some Cases be liable, if Death followed; yet that can only be with regard to the Person he invades, but never with regard to what accidentally happens to another Person. And so *Carpzovius* explains the Matter, *Qu. 1. § ult.* in these Words, *Supradicta enim (quod nempe danti operam rei illicitæ imputari debeat, quicquid fuerit præter ejus intentionem ex eo actu secutum) procedant tantum, quantum ad subjectum, circa quod versatur ipsa malitia illicitæ operantis, & quantum ad ea quæ illi objecto per se & immediate junguntur, aut necessario sequuntur; non autem quoad illa quæ per accidens oriuntur, à re illa mala, cui opera datur.* Besides, 'tis certain that the Brocard is no Rule at all in the Matter of Manslaughter, otherwise there never could be such a Thing as culpable Homicide; which 'tis plain there is.

THE Next Thing to be considered is, what was and is the Law of Scotland concerning this Matter. And *First*, as to our ancient Law, the Pursuers seem to be the first that e-



ver disputed, that according to it there was a Distinction betwixt Slaughter and Murder. Sir George Mackenzie is express upon it, *By our Law*, says he, *Slaughter and Murder did of old differ, as homicidium simplex & præmeditatum in the Civil Law; and Murder only committed, as we call it, upon forethought Felony, was only properly called Murder, and punished as such; for which he quotes the express Statute, Parl. 3. Cap. 51. K. James I. appointing that Murder be capitally punished, but chaud melle, or Slaughter committed upon Suddenty, shall only be punishable according to the old Laws, and several other Acts of Parliament, to which we beg Leave to refer\**; which expressly make the Distinction betwixt forethought Felony, and Slaughter of Suddenty: And though none of all these Laws particularly express the Punishment of Manslaughter, as they could not well do, because that was arbitrary according to Circumstances; yet, as Sir George observes, the Opposition and Distinction is established betwixt Slaughter by Forethought, and *chaud melle*, and the Punishment of the one to be less, than that of the other: And therefore we apprehend, we may leave this Point as clear and undoubted.

THE Pursuer has endeavoured, to no manner of Purpose, to set up others of our ancient Laws, in Opposition to those observed by Sir George Mackenzie, such as the 3d Statute of King Robert I. which, with Submission, is nothing to the Purpose: For, *First*, It does not concern capital Crimes only, but any Crime touching Limb, as well as Life. *2do*, Though the Word *Slaughter* is mentioned, without adding *by forethought Felony*, yet the same Thing is added in other Words, when it says, touching *Life or Limb*, to which alone the Act relates; that is forethought Felony, because Slaughter by *chaud melle* touched neither Life nor Limb. The Title of the Act is, *Men condemned to Death should not be*

re.

\* See an Abstract of some of these Acts subjoined to this Information.

*redeemed.* But what is that to the Purpose, in a Question? Who should be condemned to Death, and who not?

THE 43d Chap. of the Act of King Robert III. is as little to the Purpose; for as it speaks of Hairships, Burnings, Reif and Slaughter, 'tis very plain it means only wilful premeditated Slaughter, otherwise it would follow, that not only wilful Fire-raising, but burning of a House by Neglect, or *latâ culpa*, would infer the Pain of Death, which no Body ever dreamed. And the next Paragraph makes it further clear, appointing Sheriffs to take diligent Inquisition, *Wh any be common Destroyers of the Country, or hath destroyed the King's Lieges with Hairship, Slaughter, &c.* Can a Man be a common Destroyer by Slaughter, except where the Slaughter is supposed to be by forethought Felony? 'Tis certain he cannot; and therefore the Pursuers Procurators fall into a great Mistake in Law, when they say, That gif he be ken'd with the Assize, *Si attentus fuerit per assisam tanquam talis malefactor, condemnabitur ad mortem*, must relate to Manslaughter, because the Sheriff could not judge of Murder. It is directly otherwise: If he be attainted by the Assize as such a Malefactor, that is, as a common Oppressor by Slaughter, &c. he is to be condemned to Death. This is an Exception from the Rule, That Murder was to be tried by the Justice-Ayr: This Law appointed it to be tried in that Way, in case the Person accused could find his Barras or Borgh to compear at next Justice-Ayr; but if he could not, the Sheriff was immediately empowered to try: And by the by, this does not concern particular Fact, but concerns that general Accusation of being a common Oppressor, like to the Case of a Sorner, or one habite and repute an *Egyptian*. Nor can the Lawyers for the Pannel find any Word in the Statutes of Alexander II. which the Pursuers refer to, that does in the least presuppose that Manslaughter was capital in them: The direct contrary appears, that Man-



slayers were to be tried, whether guilty of Murder or not; and if found not guilty, that they were to have the Benefit of the Gyth. And accordingly *Skeen* in his Annotations, refers directly to the Acts of Parliament, which Sir George Mackenzie takes notice of, establishing the Distinction, and to some of the *English* Acts to the same Purpose.

As to the Passage cited from *Skeen*, in his Treatise of Crimes, Tit. Slaughter, there is certainly a direct Blunder in the Printing; and instead of these Words, *or casually by chance melle*, probably it ought to have been, *not casually, or by chance melle*; for otherwise he directly contradicts himself, and cites Acts of Parliament which prove the very contrary of what the Pursuers would make him assert: Yea, the very next Paragraph establisheth the Distinction in these Words, *That the Gyth or Sanctuary is no Refuge to him who commits Slaughter be forethought Felony*; ergo it was a Refuge to him that committed Slaughter, not by forethought Felony; and saved him even from the arbitrary Punishment of Manslaughter. And *Skeen* himself, in his Explication of the Words *chance melle*, says it is in Latin *rixa*, *an hot sudden Tumult*, or Debate, which is opposed, as contrary to forethought Felony; and cites the Act James I. But how is it contrary in our Law, if the Effect and Punishment be the same? And upon the Words *forethought Felony*, he in like manner makes the just Distinction, and supports it by the Authority of *Cicero*, in his Treatise *de officiis*, where he is writing as a Moralist, and not as an Orator.

THE Pursuers Answer to the 8th Act, 6th Parl. James I. is quite trifling; for nothing can be plainer than the Opposition there stated betwixt forethought Felony and other Slaughter: And when the Act statutes, *That if it be forethought felony, the Slayer shall die*; the Consequence is obvious, according to the plainest Rules of Logick, *That if it be not forethought Felony, he shall not die*, otherwise the Act is absurd. And as to Sir George Mackenzie's Observation up-

on

on these Words, it is certainly not so accurately placed as an Observation upon that Act, because it plainly relates to the Act of Charles II. and therefore falls to be considered, when we come to argue the Import of that Act.

THE Pursuers Observation, by way of Answer to the 5th Act, Parl. 3. James I. is intirely nought; for if it extend the Difference between forethought and *chaud melle* to all Transgressions as well as Manslaughter, then for certain it establishes the Distinction in the Case of Manslaughter; and so Sir George Mackenzie likewise says, in his Observations on this Act, as well as in his Criminals. And as to his further Observation, That *chaud melle* is by our present Law punishable by Death; that still refers to the Act of Parliament Charles II. and must be examined with it.

THE Pursuers have further pled, "That the Benefit of the Sanctuary might be competent where Crimes were capital;" which he founds upon the Statutes of Alexander II. But this is not worth disputing; for if the flying to the Sanctuary, join'd with Repentance, and so forth, rendered the Crime not capital, it is all the same thing; that is in effect to render the Crime not capital only by another Form, but still the Substance remains, that according to the Law the Pain of Death was not to be inflicted. At the same Time that Statute concerning Rents, whereby Repentance absolves from the Punishment, is somewhat peculiar, and does not at all contradict the other Laws, which make or suppose *chaud melle* not to be capital; and the last Part of the Statute, appointing, That if Manslayers fly to the Kirk, the Law shall be keeped and observed to them, establishes the Point, that if they were not found Murderers by Forethought, they were to be returned to the Sanctuary, and freed from Punishment.

THE Pursuers say, "That after the Reformation, when the *jus asyli* was in effect abolished, then the Distinction betwixt forethought Felony and *chaud melle* ceased; and

" that



that it was never objected, that Malice or premeditate Design was requisite to make the Crime capital." And for this they take notice of two Cases, *Currie* against *Frazer*, July 1641, and *Bruce* against *Marshall*, April 1644. But in the First Place, The Procurators for the Pannel with Reason say, That if that happened, it was an Error in Judgment; for since the Distinction was established by the old Laws, and that there was no Law at that Time altering or repealing those old Laws, the Abolition of Popery, and of the flying to the Kirk in consequence, was no Reason for judging contrary to the Civil Laws that were still standing; and if an Escape of that kind happened, it must be attributed to the over great Zeal, and, if we may be allowed to say it, a sort of Enthusiastick Keeness of those Times: And we do apprehend, that the Act 1649, and the Act of *Charles II.* were intended to correct the Errors that by too great Zeal had then crept in.

At the same Time, as to the two Cases cited, they are nothing to the purpose; for as to the first, which is *Frazer's*, there was not one Circumstance pled or proved which could make the Slaughter *chaud melle*: But on the contrary, it appeared direct premeditate Murder, no real Provocation, but a Quarrel about a Staff; a Murder committed in Revenge, upon the Slayer's hearing the Person killed had murdered his Brother, which plainly implied a premeditate Design. What Argument this can afford, is submitted. This indeed may be remarked, that the Case gives some Notion of the Spirit of the Times; the Presbytery took Evidence whether the Murder was accidental or wilful, they found it to be wilful, and nowise accidental; their having done so, was taken as Evidence in Court, and even the Wife of the Deceased was sworn as a Witness: Things 'tis hoped not to be drawn into Example; only so far it shews, that even then it was a Consideration by the Presbytery themselves, Whether it was a wilful Murder or not? which seems to point at an Establishment of the Distinction.

tion. But in short, there is not one Circumstance in the whole Case that could exclude the Premeditation or Forethought, but all quite on the contrary.

THE other Case of *Marshall*, in the 1644, is as little to the purpose; he was libelled for wilful Murder, and he confessed it, without pleading any Defence, because indeed he had none. He in his Confession adjected some Circumstances which might have given some Colour, but indeed very little for a Defence; But he offered no Proof even of those Circumstances; and his own Declaration could be no Evidence of them. They were not intrinsic, but extrinsic Qualities of the Declaration. He had given repeated Stabs with a Knife. Where could be the Question that that was Murder? And these being all the Instances the Pursuers bring before the Act of *Charles II.* 'tis plain they prove nothing by them.

As to the Act, *Charles II.* \* it is humbly insisted for the Pannel, That it introduces no new Law against any Person accused of Slaughter, but ascertains somewhat in their favours, viz. *That casual Homicide, Homicide in lawful Defence, and Homicide committed upon Thieves, &c. shall not be punished by Death.* And then further statutes, *That even in case of Homicides casual, it shall be leifom to the Criminal Judge, with Advice of the Council, to fine him in his Means; &c. or to imprison him.* This Law seems introduced to correct some Abuses that had been; whereby Homicides falling under some of those Descriptions, either had been punished with Death, or at least that it had been made a Doubt of, if they might not be so punished. What those Cases were, does indeed not appear from the Records, so far as the Pannel's Procurators know; but it seems such Cases, at least such Doubts were. But then the Act does not determine what was meant by casual Homicide, and does by no means say, that nothing was to be reckoned casual Homicide, except that which

---

\* This intire Act is hereto subjoined.



which was merely accidental ; but on the contrary, it leaves casual Homicide to be explained, according to the Construction of former Laws, whether our own Laws, or the Laws of other Nations.

2do. It is plain from the Act, that by casual Homicide, something is understood quite different, at least beyond Slaughter merely accidental ; for the Act is concerning the several Degrees of casual Homicide : And so even Homicide in Defence, and Homicide committed upon Thieves, &c. are brought under that general Description of casual Homicide ; and these last Kinds are given as Exemplifications of the general Description : which shews, that casual Homicide was intended to be opposed only to Slaughter dolose, committed either by premeditate Forethought, or Malice presumed to be taken up from the Circumstances immediately preceeding the Act ; and therefore, however critical Exceptions may be taken to the Rule, yet materially there is no strong Objection lyes to it, because when *casual* is taken in the extensive Signification, as opposite to *fraudulent* and *dolose Slaughter*, all the Species mentioned in the Act do properly enough fall under it, and are Degrees of casual Homicide. And indeed it is worth observing, and makes in this Case for the Pannel, that the Rubrick cannot be said to have been indigested or adjected by mere Inadvertency, since the same Rubrick is made use of in the Act 1649, and again repeated in the 1661, so many Years after.

AND this Rubrick affords another plain Argument, That the Legislative did at least consider that there might be Degrees of casual Homicide, and consequently they could not understand by that, only merely accidental Slaughter, strictly so called : Since there can be no Degrees of that ; it is but one, and does not admit of Degrees. And therefore this is sufficient to shew, that more was meant than the Pursuers incline to admit ; and if more was meant, that can allow of no other Construction, than to bring under these Words what the Law-

yers

yers call *culpable Homicide*, so as that your Lordships and the Jury may judge from Circumstances, whether the Slaughter is to be reckoned as casual, or really malicious, from Malice prepenſe.

THE last Part of that Act of Parliament further enforces that Matter, which gives a Power not only to fine for the Use of the nearest Relations, but even to imprison for casual Homicide. Now, how is it possible to believe, in Consistency with any Justice; that a Man might be imprisoned for a Fact intirely innocent, and nowise either culpable or criminal? yet such Homicide merely accidental is: And therefore this shews to Demonstration that the Legislative understood, that under the Description of casual Homicide such a Fact might come as carried a *culpa* along with it, and was not absolutely accidental or innocent.

AND this being the plain Meaning of the Law, it must remain only to consider, whether culpable Homicide, or more particularly the present Case, does not in a true and legal Sense fall under the Words *casual Homicide*. And we hope we can be under no Difficulty to make that good, from what has been already said; *First*, That even by the *Jewish* Doctors and Interpreters of the *Mosaick* Law, Homicide without Hatred and Foresight, hath been called *casual Homicide*; the Passage above cited from the Collation of the *Mosaick* and *Roman* Law, expressly shews it. *2do*, All that has been said from the Texts of the Civil Law, and Lawyers, prove it; since they directly call Slaughter, *ex subito impetu, ex calore iracundiae, in rixa*, where there was just Provocation, *casual*; *casu magis quam voluntate fit; casui magis quam noxae imputandum*: And all the rest of their Expressions plainly denominating all Slaughters *casual* in the large Sense, except that which is done *doloſo animo occidendi*. *3tio*, The Expressions in our own old Laws prove the same thing; those kind of Slaughters are called *chaud melle* or *chance medley*, which is casual: And so *Skeen* speaks, in the very Place the Pursuers have cited,



ted. *Manslaughter committed voluntarily, be forethought Felony, or (or not which ever of the Degrees be received) casually by chaud melle.* There your Lordships see *chaud melle* is expressly brought under the Description of casual; and so that being the Case, we are under the Letter of the Act. *Charles II.* we are included under the first Branch of *casual Homicide*.

AND as we apprehend this holds in general, so it holds more particularly in the Pannel's Case, where whatever was designed against *Bridgeton*, yet, as to my Lord *Strathmore*, the Killing was casual, and therefore falls directly under the Words of the Statute.

It affords no solid Argument against us, That the Act of Parliament bears these Words, *for removing of all Question and Doubt that may arise hereafter in Criminal pursuits for Slaughter.* For *imo*, Those Words must still be understood with regard to the Particulars enacted upon, that it is for removing *all Doubts* as to those Particulars; for it can never be pretended, that this or any Act of Parliament could remove all Doubts, even upon unforeseen Cases, many of which might happen that could not fall under the Words of that Law: For instance, Homicide committed in suppressing a Mob, strictly speaking, falls under none of the Words; or Homicide committed in preventing the Escape of a Prisoner actually imprisoned, and endeavouring his Escape: And many other Cases may be figured. But *2do*, According to the Interpretation we insist upon, the Act of Parliament does remove all Questions, so far as humane Eyes could foresee, if the Words [*casual Homicide*] be taken in the Sense we give them; and on the contrary, it does not remove all Questions, if culpable Homicides, and this very Case, be not included; for then the Law has statuted nothing upon them, either one way or other, but hath only statuted upon Murder merely accidental, Homicide in Defence, and the others therein mentioned. Besides, that it may be pled  
without

without any Stretch, That a culpable Homicide is a Species of Homicide in Defence, though not precisely in Defence of Life, it is in Defence against a further Injury threatned, and expected from the prior Injury already given: And on these Considerations we humbly apprehend the Act of Parliament makes nothing against the Pannel, but rather favours him, since the Question is anent a Homicide purely casual as to the Person that was killed; and which Consideration intirely distinguishes his Case from every other Case that hath been tried since the Act of Parliament. And it may not be improper to notice, that Sir George Mackenzie says, *The Word Casual, in the Rubrick of this Act, is taken in the lax Signification.* And why not then take it in the same lax Signification in the statutory Part?

It is now proper to take Notice of Sir George Mackenzie's Observations upon the 51. Act, James I. And in the First Place, If Sir George be supposed to go as far in his Opinion as the Pursuers plead, we must beg Leave to oppose the Law, and submit the Interpretation of it to your Lordships Judgment, as not sufficiently supporting his Opinion. 2do, Sir George says nothing against the Slaughter's being casual in the present Case, where the Blow was intended at one, and another struck by Fatality. 3tio, His Words do not go so far as the Pursuers would stretch them; for in his Observation on the said 51. Act, he only says in general, *That chand melle, or homicidium in rixa commissum, is capital by our present Laws:* And so it is in many Cases; for instance, where the Killer is the Provoker, where he reiterates Strokes in such a manner as to shew a Forethought and formed Design, although not premeditated for a long Interval of Time before: But Sir George does by no means say, that *chand melle* or *homicidium in rixa commissum*, is in every Case capital; the contrary is most certain, as will appear from your Lordships Judgments afterwards to be noticed.



HIS Observation upon the 90th Act is nowise against us; he says indeed, *That Murder, though committed without forethought Felony, is punishable with Death*: By which he must mean premeditate Malice; and that is true; for no doubt Malice, where it can be presumed from the Act itself, and where the contrary does not appear from Circumstances, is punishable by Death, without further Forethought; but then he subjoins an Exception, which leaves the Matter where it was, *except, says he, it be casual*; that is, according to the Words of the Law: And so the Question remains, What is casual in the Sense of that Law?

THE Pursuers use an Argument, which seems to be of no Force. "That if Manslaughter was not capital, then the Crown could not pardon any capital Slaughter; because by our Law the Crown could not pardon Murder." We might easily admit the whole, without hurting our Argument; for if it be true that the Crown could not pardon Murder, then it is likewise true that he could not pardon any Slaughter that was capital; because no Slaughter was capital but Murder: Nevertheless the Position, That the Crown could not pardon Murder, is not supported by Practice, and we doubt, not by our Law; because in several Cases, even of Murder, the very Thing statuted is, *That the Person of the Criminal shall be in the King's Will*; consequently the King can pardon, as well as order to be put to Death.

THE Pursuers, in their Information, next go on to mention a great many Cases that have been judged by the Court since the Act 1661; and the first mentioned is that of *William Douglas*, which appears in the Records, and is noticed by Sir *George Mackenzie*, and is indeed noticed by him as a Foundation for some Things, wherein he seems to go too far. But this Case will never deserve any Regard; it has always been look'd upon as a hard one, and we are afraid a Reproach on the Justice of the Nation. But at the same time the Fault did not ly on the Court; it was truly the Jury; for the Trial went

went in general upon the Art and Part; and there appears no particular Pleadings to this purpose on Record in that Case: So that what Sir George says of it must be from mere Memory of Things not thought fit to be recorded.

THE next Case mentioned is that of *Nicolson*, in the 1673; which can never make for the Pursuers; because there your Lordships sustained both the Libel and the Defence, though indeed the Defence was not proved: And therefore if the Pursuers say, that the Defence was upon *chaud melle*, or culpable Homicide; the Case is with us, because your Lordships sustained the Defence. And although in reality the Crime was proved to be wilful Murder, and the Defence not proved; yet so far it is on the Pannel's Side, that the Advocate insisted *Nicolson* was *versans in re illicita*, by carrying a Gun which he acknowledged used to go off on half-bend; yet your Lordships sustained the Defence, *That the Gun went off in a Struggle*: And if an Argument from a Lawyer's Pleading be good for any thing, Sir George Mackenzie pled for the Pannel in that Case some of the very same Principles we now insist on, *That there was no Prejudice against the Person killed, and that the Gun went off in a Struggle*. But indeed the Case is nought in the Argument, and it seems strange why it is cited: It is true the Man was said to be drunk, and there was not a previous Quarrel; but then there was no Provocation, no *justa causa iracundiae*, and no *iracundia* at all; but the Gun was twice deliberately snapp'd, and the third Time the Man was killed.

THE third Case mentioned, is *Murray contra Gray*, yet less to the purpose than any other: For there, the giving the Wound was libelled so far premeditate, that the Slayer followed the Person out of the House where he was, and killed him without any Provocation: And not one single Fact was pled in Defence, but a strange Demand made, that the Lords should make an Inquisition in order to discover who was the first Aggressor; but it was not once pled that the Defunct was  
the



the Aggressor or Provoker. What can be the Meaning of citing such Cases?

THE next Case cited is that of *Aird*, in the 1693; which indeed is something more to the Purpose, but yet does not answer the Pursuers Intention: For the Lords did not there find, That every Homicide was capital, except what was merely accidental; they indeed sustained the Libel, and repelled the Defences, which were mainly founded upon Provocation by ill Words from a Woman, and her throwing a Chamberpot at the Pannel's Face, who was a Soldier: Which the Lords did not find sufficient to exculpate from the Libel, which bore reiterate Strokes to have been given the Woman in her own Door, (which by the by was *Hämsucken*) she thrown over the Stairs, and pursued by the then Pannel. That Case was very singular: First, an Attack upon a Woman by a Soldier, who ought to have contemned Insults from the Female Sex, at least, not returned them with any Blows: No Injury of that kind from a Woman, can justify Blows given, much less reiterated Blows, and deliberately trampling to Death, throwing her over her Stair, and still continuing to pursue her: There, the presum'd Difference of Strength, and Difference of the Sex, made such an Attack a barbarous Murder; just as an Invasion by a much stronger Man against a weaker, or by a Man against a Woman, although not with a mortal Weapon, would make a Blow with a mortal Weapon, given by such a Woman or weaker Person, come within the Description of Self-defence: Which is a Case that Lawyers state, although the same Thing would not be good, if they were of equal Strength, or that the Invasion was by the Woman, or Person of weaker Strength.

ANOTHER Case mentioned, is that of *Carmichael* in the 1694. But sure your Lordships must be weary of so many Cases, so little to the Purpose: For neither there, is there one Circumstance pled upon to exclude Forethought, or to show that the Thing was casual in any Sense; but some trifling

fling Objections against the Form of the Libel: Only indeed, Drunkennels, by it self, was founded on, which your Lordships did not sustain. And who can doubt it must be so?

THE seventh Case mentioned by the Pursuers, is that of *George Cuming* in the 1695. And upon looking into the Case, it must be owned, that it seems a very narrow hard Case: But then, the whole Burden of the Pursuers Pleading turns upon this, That supposing there was a *rixa*, and that the Thing happened upon a sudden Quarrel; yet *Cuming* himself was the first Provoker, and the *autor rixe*, and therefore could not plead the Benefit even of Self-defence; which indeed brings the Case within what all Lawyers agree on. And had it not been for that Circumstance, 'tis impossible the Decision could have gone as it went: For in effect, the King's Advocate admitted the Defence, barring that Circumstance; but insisted upon that as what governed the Case. Yet still the Decision is narrow.

THE Pursuers also mention the Case of *Burnet of Carlisle*, anno 1711. But it is plainly against them; and it being to be noticed for the Pannel, shall not be dwelt upon here.

THE next Case is that of *Hamilton of Green*, anno 1716; which does not at all meet: For there a plain Murder was libelled, That the Pannel first made several Pushes with his Sword and Scabbard upon it; and not content with that, drew the Sword, and gave the Defunct the mortal Wound. And no Provocation was pled upon, on the Part of the Pannel, except what was verbal only. And the only real Injury, by striking with the Sword and Scabbard, was admitted to have been given by the Pannel. And though it was there pled, That the Defunct himself rushed upon the Sword, that was contrary to the Libel: And if the Fact had come so out, the Libel would not have been proved. And therefore, that Case does not at all meet; for there werenot sufficient Circumstances to exclude the Dole, or so much as to make a *homicidium culposum*.

AN.



ANOTHER Case they mention, is that of *Thomas Ross* and *Jeffrey Roberts*, 20th July 1716; which makes against the Pursuers, as it is set forth by themselves; For there the Lords did sustain the Defence of Provocation by Words, receiving a Blow on the Face, being pull'd down to the Ground, and beat with a great Stick or Car-rung, relevant to restrict the Libel to an arbitrary Punishment. And though the Words, *To the imminent Danger of his Life*, are inserted as they were pled in the Defence; yet that was not a Fact, but a Consequence inferr'd from the being struck With a Stick. And if the *periculum vite* had been the Foundation on which the Interlocutor went, then it must have been unjust; because no Man alive ever doubted, that a Man in Self-defence, might lawfully kill; without being subject to an arbitrary Punishment, or any Punishment whatsoever: But the Case was, That your Lordships found the Provocation and real Injuries reduced the Fact to a *homicidium culposum*. You indeed sustained the Reply, That the Defunct was held by *Jeffrey* at the Time of receiving the Wound, because that excluded the Defence, of the Pannel's being upon the Ground when he gave Wound, and made the Fact amount to Murder; because it never was doubted, but if one stab another, especially with a Knife, which is stabbing in the most barbarous Sense, when that other is held, and so put out of the State of doing further Injury, that is Murder by the Law of all Nations.

THE Pursuers likewise mention a Case of *Davidson*, without noticing either Date or Circumstances; and therefore the Pannel must conclude there was no Defence proponed, exclusive of the Dole or Forethought.

THE Case of *Lindsay* and *Brock*, the *Greenock* Taylors, is very far from putting the Case out of doubt, or indeed touching it at all. The Case was, That the Defunct was enticed out of his House, and was attack'd by two at the same time; and when he and they were on the Ground, one of them,

them, which came out to be *Lindsay*, stabbed him in the Throat with a Pen-knife. There your Lordships did not sustain the Crime as capital against them both, even upon the Art and Part, but only against the one who should appear to have given the Stab, and that came out to be *Lindsay*: But then indeed you found, not without Difference in Opinions, That nevertheless he had the Benefit of the Indemnity, upon this Foundation, That though the *homicidium* was *dolosum*, because of the Circumstances, yet it was not from Malice premeditate: And the Majority were of Opinion, that the Indemnity excluded nothing but premeditate Murder, and did not touch any Case done *in rixa*, notwithstanding the Person guilty might be the *auctor rixe*. This does by no means determine any Question betwixt a *dolosum* and *culposum homicidium*; for that Fact was insisted to be *dolosum*, and indeed so found. 'Tis true it proves that an Indemnity may reach even a *homicidium dolosum*, where the Dole arose immediately, and not *ex intervallo*; but that says nothing to this Question, nor is it proper to enter upon the Argument about the Indemnity, now that the Judgment is given.

THE Case of *Matthews* the Soldier, the Pursuers admit was of the same Nature, and so needs no other Answer; only, That in that Case, there were no Circumstances sufficient to exclude the Dole, or make it only a culpable Homicide.

THESE are all the Cases the Pursuers have mentioned, and, if Numbers would do, no Doubt there is enough; but your Lordships are to judge how far to the Purpose: And one Thing is remarkable with regard to them all, That not one of them touches the Case in Hand, in so far as concerns the Slaughter's being casual as to my Lord *Strathmore*, the Invasion being intended against *Bridgeton*.

BUT now the Council for the Pannel beg Leave to take notice of several Decisions, even since 1661, which directly establish the Point pled for the Pannel: And the first is *Ma-*



*son's* Case in the 1674, to be seen in the Record; and also observed by Sir George Mackenzie. *Mason* was accused of killing *Ratston*. The Defences were three, First, That *Ratston* had followed *Mason* from House to House, at last put violent Hands upon him; whereby *Mason* was forc'd to throw him off, and that he fell against a Stool. 2<sup>d</sup>, That the Wound was not mortal, but *Ratston* died *ex malo regimine*. 3<sup>rd</sup>, That the Homicide was merely casual, and in Self-defence, *Ratston* being the Aggressor. The Lords sustained the Libel only relevant to infer the *penam extraordinariam*, and separately sustained the other Defences to *affoizle in totum*, and remitted all to the Knowledge of the Inquest. Here your Lordships see, the Killing only sustained *ad penam extraordinariam*, without regard to the three Defences, of casual Homicide, Self-defence, and dying *ex malo regimine*; for they are all sustained separately to *affoizle*, even from the *pena extraordinaria*. Here then was a culpable Homicide, sustained only *ad penam extraordinariam*, though neither merely casual, nor in Self-defence; and so there can be no Judgment more direct upon the Point now pled.

AND here the Pannel must notice, once for all, That it makes nothing to this Question, That in that, and other like Cases to be mentioned, a mortal Weapon was not used; for it is one Question, What is sufficient to make a Homicide only culpable? And quite another, Whether, in our Law, there is such a Thing as culpable Homicide, though neither merely casual, nor in Self-defence? That of the using a deadly Weapon enters into the Argument, Whether a Homicide is dolose or culpable only? But it makes nothing to the other Question, since Homicide may not be merely casual, although no mortal Weapon is used, as appears both from this Decision, and the Case of *Bain*, cited for the Pursuers.

ANOTHER Case, is that of *Grierison* and others, 12<sup>th</sup> March 1684; where the Pannels being accused of Murder, for killing the Defunct in a Scuffle; the Defence proponed was,  
That

That the Defunct was the first Aggressor, and did invade the Pannels, or one or other of them; and that *William Grierson*, or one or other of them, being standing before the Fire, the Defunct threw the said *William*, or one or other of them, in the Fire, and fell upon him himself; and then, after the Soufle was over, the Defunct did rise, walked up and down, discoursed, and of new again, beat the said *William Grierson*, and threatened to kill him, if he would not be gone; that the Defunct went in good Health to the Door thereafter. These the Lords sustained relevant to liberate from the ordinary Pain of Death. Here is another Decision in Point; the Crime was not found merely casual, or the Court must have assolizied; at least, could only have imprisoned, and would have inflicted no other arbitrary Punishment. But that was not the Case, it was found culpable, and not merely casual; and therefore the Punishment restricted. Sure then, it is not true in Law, that all Homicides are capital, unless they be merely casual.

A third Case, is that of *Maxwell* and others, 7th November 1690, pursued for the Murder of *John Russel*, where the Court sustained this Defence, That there was a previous Combination to make a Convocation, in order to debar and keep out Mr. *Walter Macgill*, Minister of *St. Andrew*, from entering into his Church that Sunday, in consequence of which, a Convocation happened; and when they were required to disperse, they took the Keys from the Beadle, and beat the Notar, and the Minister's Wife, and others, before the Slaughter was committed, relevant to restrict the Slaughter to an arbitrary Pain. And found yet further, That if any actual Attempt was made, by throwing great Stones at the Minister, before committing the Slaughter, that that was sufficient to liberate from the Slaughter *simpliciter*. Sure the first Part of the Defence, implied neither accidental Homicide, nor self-defence; but a Provocation by real Injuries; yet the Court justly sustained it to restrict.



On the 6th November that same Year, another Judgment was given, very opposite to the Pursuers Pleadings, in the Case of Captain Price and others, who were prosecuted for shooting one John Reid a Tradesman of Glasgow, and Serjeant at that Time, of a Guard kept in that Town. The Case was, That Captain Price, and others with him, had made some Disturbance in the House where they lodged, and committed some Rudeness to the Landlady and her Maid, which occasioned the Guard to be called; and when the Guard came, commanded by Reid, and entered the Room where Price was, he and his Company resisted the Guard, and one of them shot Reid dead. The Defence proponed was, "That before any Guard came, a Mob had begun to rise, and had gathered at the Door where the Officers were, who had shut the Door upon themselves, and cried to shoot the Dogs, and Words to that Purpose: That when the Guard came, they did not know it was the Guard, but resisted and fired, from apprehension that it was the Mob, and so killed Reid the Commander of the Guard." The Lords sustained that Defence relevant to restrict the Libel. And in that Judgment, beside the Establishment of the general Principle, this may be observed, That Reid was killed by Mistake, as one of the Mob, and there neither was nor could be any Provocation from him; neither was it pled, That the Mob had given any real Injury, but only were gathered in a tumultuous way, and uttering injurious Words: Yet the Court justly restricted the Libel; though 'tis plain the Slaughter was not accidental, except in so far as the Commander of the Guard was killed in Place of a Mobber. Neither was it Self-defence, because the Pannels had no Right to resist the Guard, only there was an Injury by the Convocation, and an Apprehension given of greater Injuries, though that Apprehension was not solidly founded.

THE Case of Captain Wallace firing on the Boys from the Abbey, may likewise be noticed; but being a well known Case,

Case, needs not be at length recited.

A fourth Case is that of Ensign *Hardie*, 6th June 1701: He was accused of Murder, by giving repeated Thrusts with a drawn Sword; to one *Smith*, who at the Time had no Arms, whereof *Smith* instantly died; and that he afterwards boasted of his Crime and Cruelty, telling other Gentlemen, That he had bowed his Sword upon the Person of a Fellow at *Scarbridge*. The Defence, proponed, and sustained, was, " That the Defunct was the first Aggressor, and did take hold of the Pannel's Horse-bridle; and when he was holding the Horse by the Bridle, did give the Pannel a Stroke over the Face with a Rung or Tree, and wounded him to the Effusion of his Blood; and that the Defunct beat the Pannel from his Horse." These were found relevant to restrict the Libel to an arbitrary Punishment. And then the Reply was sustained relevant to glide it, " That the Pannel beat the Defunct on the Face with a twisted Rod, before he struck the Pannel." Here again the Point is fixed; no casual Homicide, not Homicide in Self-defence: And so your Lordships had found by a former Interlocutor, wherein you repelled the Defence, when proponed as Self-defence, but yet restricted the Punishment, because the Homicide was culpable.

A fifth Case, yet stronger, is, that of the 1st March 1710: *Peter Maclean*, who was accused of the Murder of *James Ewing*, by shooting him dead with a Fowling-piece, when *Ewing* had no Arms in his Hand. The Defence sustained to restrict the Libel to an arbitrary Punishment was, " That the Defunct quarrelled the Pannel, under the Name of Rascal, how he durst carry a Fowling-piece, and that if the Prince had his own, he durst not so do; and adding these Words, That her Majesty was but a Whore, and thereupon assaulted the Pannel for taking his Carabin from him." These are the Words of the Interlocutor; and it is so plain, that no Observation needs be made upon it.

ANO-



ANOTHER Case is, that of *Barbours*, 23d January 1710: He was accused of murdering *Andrew Bruidwood*, by throwing him down to the Ground, and giving him several Strokes and Bruises, whereof he died. Your Lordships found the Libel only relevant to infer an arbitrary Punishment; yet the Fact was not intirely casual, nor pled to be so: And you sustain'd the Defence, That the throwing down, libelled, was only a Wrestling, out of no Malice, and that previous thereto the Defunct was valetudinary, and in the Habit of spitting Blood, relevant to elide the Libel in totum.

THE Case of *Gouan*, 3d March 1710, is not so plain as the others above mentioned; but yet it does assist in the Question: For there your Lordships sustained opprobrious Language and Invasion, by beating in a Scuffle, though without mortal Weapons, relevant to restrict the Punishment of killing with a Sword, even suppose the Killing should be proved to have been without the Door of the House, when the last Beating was only pretended to have been within the House; and so the Beating must have been over before giving the Wound, and the Pannel employ'd in *prosequendo*, by way of Retortion of the Injury that had been given.

ANOTHER unanswerable Case is that of *Carlops*, January 8th 1711; the Circumstances of which are so well known, that 'tis in vain to repeat them; sure it was neither accidental Homicide, nor Homicide in Defence: But the Lords sustained the Defence, That the Beating was *per plures commissum*, in Conjunction with any two of the following Defences, viz. That any Beating committed by them was in a *Tuilzie* or *mixa*, in which they mixed themselves, to relieve a Youth in the Defunct's Grips, or in a Struggle with him. Or, Separatim, That they had Swords about them, and only made use of Staves or Batons, relevant to restrict the Libel to an arbitrary Punishment.

THERE is another Case likewise worth noticing, 18th December 1712, the Case of *Serjeant Davies*, who was accused

case of the Murder of Mr. Robert Pank — where your Lordships found the Pannel his being alone, Time and Place libelled, and a Scuffle then happening betwixt the Defunct, with two or three more in his Company, and the Pannel, and after a beating with Staves betwixt the said Men and the Pannel, the said Pannel his retiring and calling for the Guard, and being mutilate in the Hand before he gave the said mortal Wound, relevant to restrict the Libel to an arbitrary Punishment.

ANOTHER very late Case is that of *Jasper Keyfanna*, 14th December 1724, where the Pannel being accused of killing *Robert Lamb*, by throwing him over the Stairs, without Cause or Provocation, whereby he was brain'd; your Lordships sustain'd it only relevant to infer an arbitrary Punishment: Yet sure it was not accidental, far less in Defence. All which Cases plainly establish the Point, that even since the Act of Parliament 1661, the constant Practice hath been to find culpable Homicides only relevant to infer arbitrary Punishment; and that there are Homicides not punishable with Death, though neither merely accidental, nor in Self-Defence.

THERE is also a Case which deserves to be noticed, as to that Point, of a third Party's being killed when interposing betwixt other two in a Scuffle: Which is the Case of *John Graham*, 1st December 1712, where *Graham* was accused of murdering *David Cochran*. But your Lordships sustained the Defence, That while he was attacked by *Blyth* with a drawn Dirk, the Pannel was in his own Defence with a drawn Bayonet; and that in the mean Time, the Defunct interposing as a Redder betwixt them, did casually receive the Wound libelled, relevant to restrict the Libel to an arbitrary Punishment.

THIS Information having drawn to so great a length, we are unwilling to trouble your Lordships with further References to the Laws of other Countries, particularly to the Law



Law of *England*; although we apprehend the Law there does not differ substantially from our Law in this particular, except it be in these; 1<sup>st</sup>, That Manlaughter is in effect not punishable at all in *England*, otherwise than by a kind of elusory Punishment; 2<sup>do</sup>, That in no Case *dolus* is presumed only from the giving the Wound, except upon the particular Statute of Stabbing: Whereas indeed it is in several Cases otherwise with us; culpable Homicide is punishable arbitrarily, and no doubt in many Cases, where contrary Circumstances do not appear, the giving the Wound presumes Dole, and even by the Statute of Stabbing, the Killer hath the Benefit of his Clergy, if the Person killed give the first Blow or real Provocation, and that although the Provocation did not immediately precede the Act of Killing, if it happened at any time of the Quarrel.

THAT by the ancient Law of *England*, slaying a Man did not infer Death, yea perhaps not what we call Murder it self, seems plain from *Affisa Henrici Regis apud Northampton*, published by *Selden*, in his *Fanus Anglorum*, Pag. 120 of the last Edition; by which it appears, that even Murder it self and Robbery, was punishable only by Mutilation, such as cutting off the Hand or Foot: And all their Law-books, as well as the daily Practice, establishes the Distinction betwixt forethought Felony and slaying on Suddenty; yea of old, even a Murderer by Malice prepense seems to have had the Benefit of the Clergy, and that Benefit only taken away from such Murderers by the 1<sup>st</sup> Act, 23<sup>d</sup> Henry VIII. and their Books of Reports are full of the Examples that Slaughter on Suddenty is not Murder or capital. In *Cook's Reports* it is stated, That several Men playing at Bowls, two of them quarrelled, and a third, in revenge of his Friend, struck the other with a Bowl, of which Wound he died: This was held Manlaughter; for it was done upon a sudden Emotion, in revenge of his Friend.

THERE likewise, two Boys combating together, one of them

them was scratched in the Face, and his Nose run a great Quantity of Blood; he went three Quarters of a Mile off to his Father; who seeing him all bloody, took in his Hand a Cudgel, and went three Quarters of a Mile to the Place where the other Boy was, and struck him upon the Head, of which the Boy died. This was held but Manslaughter; for the Ire and Passion of the Father was continued; and there was no Time determined in the Law that it was so settled, that it shall be adjudged Malice prepenſe in Law.

THE Case of *Mawbridge*, set down at length by Lord Chief Justice *Keyling*, makes strongly for us; and we beg leave to refer to the whole Treatise there set down, and particularly to the first Ground of Provocation, which he declares to be sufficient so as to alleviate the Act of Killing, and to reduce it to a bare Homicide: He says, *If one Man, upon angry Words, shall make an Assault upon another, either by pulling him by the Nose, or filipping upon the Forehead, and he that is so assaulted shall draw his Sword, and immediately run the other thorow; that is but Manslaughter; for the Peace is broken by the Person killed, and with an Indignity to him that received the Assault: Besides, he that was so affronted might reasonably apprehend, that he that treated him in that Manner might have some further Design upon him.* Your Lordships see how close this is to the Case: The Insult and Indignity done by *Bridgeton* was vastly stronger than any thing here mentioned; and having received such an Affront, he had Reason to expect worse; more especially when, as we offer to prove, *Bridgeton* was endeavouring to pull out my Lord *Strathmore's* Sword.

WE must likewise humbly refer to several Cases set down by Serjeant *Hawkins*, in his *Pleas of the Crown*, which fully agree with what we now plead; and particularly take notice of what he says, *Pag. 84. If a third Person accidentally happen to be killed by one engaged in a Combat with another, upon a sudden Quarrel, it seems that he who kills*

M

him



*him is guilty of Manslaughter only.* And it would seem that there is even a Difference made, betwixt killing a Person that endeavours to interpose, if he tell that he comes for that purpose, and killing one who accidentally is interposed betwixt the two contending Parties, which was my Lord *Strathmore's* Case : The killing him who interposes to separate, if he give notice what he is doing, is reckoned worse than the killing the other. And this Observation shews that the present Case is stronger than the above cited Case of *Graham*, where your Lordships restricted it to an arbitrary Punishment. And what that Author observes, confirms a Distinction we have made, betwixt a Man quarrelling with another, and killing a third Party, where it is proved the Killer had a felonious Intention to murder the other, and the Case where that does not appear ; for however, in the first Case, he might be guilty of the Murder of the third Party, yet if a Design to murder the Person he quarrelled with is not proved, then he can never suffer capitally for killing the third Party : And we have already endeavoured to prove, that that must be the Case as to *Bridgeton*, where he gave the Provocation, and no Act followed against him sufficient in Law to establish a Design of murdering him.

THE Pursuers have cited the same Books, and *Mauwbridge's* Case, as for them ; but that we submit. The particular Cases of *Holloway*, and *Williams the Welshman*, spoke of by *Keyling*, are not at all to the purpose : The *Welshman's* Case was no Judgment ; but neither in that nor in *Holloway's* was there any real personal Injury, on which a great Stress is laid in all these Questions.

THE Pursuers mention another Case stated, but never adjudged : A Person shooting at Fowls with Intent to steal them, accidentally kills a Man ; that will be Murder. This perhaps may be justly doubted : Sure it would be too severe. But supposing it were so, 'tis of no Importance : Stealing, even of Fowls, by the Law of *England*, is Felony of Malice prepenic :

penſe : And where a Man attempting to commit one Felony, does another, there is little doubt but in Strict Law he is guilty of the Felony committed. But what is that to the Caſe of a Provocation by a real Injury ?

THE Purſuers have quoted the Authority of *Voet*, and a Decision obſerved by him from *Sande*, to prove, That where one Man was intended to be killed, and another ſlain, the Crime is capital : In which no doubt, *Voet* differs from many as learned Lawyers, who are of the other Side. But his Opinion, and that of *Sande*, is obviated by what is already ſaid : It is only in the Caſe of no Provocation or real Injury on the Part of him who was deſigned to be killed. And *2do*, 'Tis always taken for granted, by *Voet*, and all who are of that Opinion, that the Deſign of murdering the Perſon intended to be invaded, do appear, and is proved : But we have already ſhewn, that cannot be ſaid in the preſent Caſe.

THE Purſuers pretended, " That there was a Circumſtance in the Libel which implied Malice againſt the Earl of *Strathmore*, viz. That the Thruf given was followed by " a ſecond Puſh." But as there is nothing in this Fact, it may be the Subject of Imagination, but can never be the Subject of Proof, unleſs it were pretended, as it is not, That the Pannel drew back or out his Sword, and made a ſecond Thruf; which will appear not to be true, from the Nature of the Wound; and the Thruf will be found to have been ſo momentary, that it was impoſſible. *2do*, If any thing like that happened, it will appear, that there was no more in it, but the Pannel's ſtaggering, or moving the Sword by his Weight leaning upon it. *3tio*, There is no Relevancy in it at all; the Fact being, That the Pannel puſhed as at *Bridge-ton* : And no Circumſtance will make it appear, that he knew he had touched the Earl of *Strathmore* till ſometime after the Fatality was perfected.

THE Purſuers further pretended, " That as they had ſuppoſed Malice, they would prove it from other antecedent



" Facts that had happened some Time before, whereby it  
 " would appear that there was Enmity betwixt the Defunct  
 " and the Pannel."

It is answered for the Pannel, *answ.* That no such Facts being libelled, nor, to this Minute, condescended upon, either in the Debate or Information, they can by no means enter into the Proof, otherwise the highest Injustice would be done to the Pannel in this and every such Case: For if the pretended Facts, inferring Malice, had been libelled, then it would have been competent to the Pannel to have elided the same by a proper Proof, to shew that they inferred no Malice on his Part; he might have proved Dissimulation or Reconciliation, and would have been prepared for that Purpose. But where such Facts are concealed, and may have happened at an unknown Distance of Time, 'tis impossible the Pannel can be prepared with proper Evidences. And though it is sufficient, in an Indictment, to libel Malice in general, in order to make a Relevancy; yet then it is always understood that the Pursuer intends no more than the presumed Malice arising from the Fact libelled: Neither can such Proof come in under the Head of Art and Part, because that can only have Regard to such Facts as happen at the Time of committing the Action complained of, and such as import a Share in the Action; but cannot reach to pretended Qualifications of Malice that happened the Lord knows when.

In the *Next* Place, The Pannel offers to exclude all Presence of former Enmity, by proving, That for some Time before they had met from Time to Time occasionally, without any Marks of Enmity, but all the seeming Requisites of Friendship and Civility intervening; and particularly, that that very Day they had dined together, afterwards drunk together for a considerable Time, and visited together, in the Lady *Auchterhouse's*, a common Relation, with all Appearances of Friendship; and that the deceased Earl had kindly invited the Pannel and his Family to come and visit him and his,

His, and made a Challenge of Kindness of it, that he was too great a Stranger. In the Case of Enmity, the Divine Law it self determines, when Hatred is to be presumed, and when not: *Whoso killeth his Neighbour ignorantly, whom he hated not in Time past; in the Hebrew, from yesterday, the third Day; or, as in the Latin Translation, qui heri & nudius tertius nullum odium contra eum habuisse comprobatur.* So that the very Friendship that passed that Day on which the unhappy Accident happened, excludes all Pretence of former Enmity; suppose there had been any seeming Differences, of which the Pannel is not conscious, far less of Malice, or any capital Enmity that ever was.

UPON the whole, Though this fatal and melancholy Accident, which gives Occasion to the Trial, does and must ly heavy on the Mind of the Pannel, and produces the strongest Sorrow and Regret in all that had the Honour to know the deceast Earl; yet the punishing the Pannel capitally for an Offence which happened *casu magis quam voluntate*, would be a very rigorous Extension of the Law. It is plain, from what is above said, that culpable Homicide, both by our Law and Practice, is punishable only arbitrarily, and comes under the general Description of *casual Homicide* in the Act 1661. No Case can be more pitiful or favourable than this, where the Death happened to a Person nowise intended to be hurt: And therefore 'tis hoped your Lordships will sustain the Defence pled, relevant to restrict the Libel to an arbitrary Punishment.

RO. DUNDAS.

AB-



**ABSTRACT** of some Acts of Parliament,  
in the very Words of the Statutes them-  
selves.

**JAMES I. Parl. 5. Act 51. entitled, Of forethought Felony and chaul mella; statutes, That as soon as any Complaint is made to Justices, Sheriffs, Baillies, &c. they shall enquire diligently (i. e.) without onie Favour, gif the Deed was done upon forethought Felony, or sudden chaul mella. And gif it be found forethought Felony, the Life and Goods of the Trespasser to be in the Kings Will. — And gif the Trespass be done of sudden chaul mella, the Party skath'd shall follow, and the Party Transgressor defend, after the Course of the old Laws of the Realm.**

**James I. Parl. 5. Act 93. entitled, The Manslayer that be pursued unill he be put touch of the Realm, or brought again to the Place of the Slaunder; (the Act appointing the Method of pursuing Manslayers) statutes, That quhairver he happens to be taken, that Schireffe, Stewart, or Bailie of the Regality, sall send him to the Schireffe of the nixt Schireffedome, the quhill sall receive him, and send him to the nixt Schireffe, and so forth from Schireffe to Schireffe, quhill he be put to the Schireffe of the Schire, where the Deede was done, and there sall the Law be ministred to the Party: And gif it be forethought Felony, he sall die therefore.**

**James I. Parl. 6. Act 95. entitled, Of Inquisition of forethought Felony to be taken by an Assize; it statutes, That the Officers (i. e. the Judges ordinary) shall give them**  
the

the Knowledge of an Assize; whether it be forethought Felony, or suddenly done: And gif it be suddenly done, domain them as the Law treats of before: — And gif it be forethought Felony, — domain them as Law will.

James III. Parl. 5. Act 35. entitled, *Of Slauchter, of forethought Felony, of Suddantie, and lying to Girth.* Item, Because of the eschewing of great Slauchter quhich has been right common amongst the King's Lingers, now of late; baith of forethought Felony and of Suddantie: And because monie Persons commits Slauchter upon forethought Felony, in truste they shall be defendid throw the Immunitie of the Halie Kirk and Girth, and passis and remainis in Sanctuaries; it is thought expedient in this present Parliament, for the slanching of the said Slauchters in Time coming, quhairver Slauchter is committed on forethought Felony, and the Committer of the said Slauchter passis and puttis him in Girth, for the Safte of his Person. The Schireffe sall come to the Girth, in Places quhair he lies under his Jurisdiction, and in Places exempt, to the Lords Maisters of the Girth, and let them wit, That sick a Man has committed sick a Crime, on forethought Felony, tanquam insidiator & per industriam, for quhilk the Law grants not, nor leaves not sic Persons to joyis the Immunities of the Kirk. And the Schireffe sall require the Ordinar to let a Knowledge be taken be an Assize on fifteen Days, quibadder it be forethought Felony or not: And if it be founden forethought Felony, to be punished after the Kings Laws: And if it be founden Suddantie, to be restord again to the Freedome and Immunity of Halie Kirk and Girth.

James IV. Parl. 3. Act 28. entitled, *Quene Manslayers taken or fugitive;* Statutes, That where any Man happens to be slain within the Realm, the Manslayer shall be pursued



pursued (in a certain manner) and wherever he happens to be overtane, that the Schireffe shall incontinent send him to the next Schireffe, and so furth, quhill he be put to the Schireffe of the Schire quhair the Deed was done, and there shall Justice be incontinent done. And gif it be forsocht Felony, to die therfore.

James V. Parl. 4. Act 23. entituled, **The Matters of the Girth** shall make Deputes, quha shall delibere Malefactours, that may not bruik the priviledge thereof; statutes, That they should be holden in all Time coming, to deliver all Committers of Slaughtur upon forethought Felony, that flies to Girth, and others Trespassers that breaks the same, and may not bruik the Priviledge thereof, conform to the Common Law and the Act of Parliament made thereupon of before, to the King's Officers, askand and desirand them to underly the Law.

Follows the intire Act of Charles II. Parl. I. Chap. 22. entituled, **Concerning the several Degrees of casual Homicide.**

**O**UR Sovereign Lord, with Advice and Consent of the Estates of this present Parliament, for removing of all Question and Doubt that may arise hereafter in Criminal Pursuits for Slaughtur; statutes and ordains, That the Cases of Homicide after following, viz. casual Homicide, Homicide in lawful Defence, and Homicide committed upon Thieves and Robbers breaking Houses in the Night; or in case of Homicide the Time of Masterful Depredation, or in the Pursuit of denounced or declared Rebels for capital Crimes, or of such who assist and defend the Rebels and Masterful Depredators by Arms, and by Force oppose the pursuit and apprehending of them, which shall happen to fall out in Time coming, nor any of them, shall not be punished by

by Death; and that notwithstanding of any Laws or Acts of Parliament, or any Practick made heretofore or observed in punishing of Slaughter: But that the Manslayer, in any of the Cases aforesaid, be assilzied from any Criminal Pursuit, pursued against him for his Life, for the said Slaughter, before any Judge Criminal within this Kingdom. Providing always, That in the Case of Homicide casual, and of Homicide in Defence, notwithstanding that the Slayer is by this Act free from capital Punishment; yet it shall be leisum to the Criminal Judge, with Advice of the Council, to fine him in his Means, to the Use of the Defunct's Wife and Bairns, or nearest of Kin, or to imprison him. And his Majesty, with Advice foresaid, declares, That all Decisions given conform to this Act, since the Thirteenth of February One thousand six hundred and forty nine Years, shall be as sufficient to secure all Parties interested, as if this present Act had been of that Date: And that all Cases to be decided by any Judges of this Kingdom, in relation to casual Homicide in Defence, committed at any Time heretofore, shall be decided as is above expressed.

the Influence of the Council of the Privy Seal, and the  
James Esq. Brother of the said King, and his Majesty's  
Council, with the Council, with the Council, with the Council,  
at the instance of the said James Esq. and his Majesty's  
Advocate, for his Majesty's interest, against James Esq.  
with the Council, with the Council, with the Council,  
the Council, with the Council, with the Council,  
the Council, with the Council, with the Council,

and his Majesty's Council, with the Council, with the Council,  
Warrant, whereby the said James Esq. and his Majesty's  
of which Warrant the said James Esq. and his Majesty's  
that the Council was not and that the Council, relevant to  
inter the Council, with the Council, with the Council,  
Council, with the Council, with the Council,  
Council, with the Council, with the Council,  
Council, with the Council, with the Council,

N

Curia



**Curia Jusficiaria S. D. N. Regis, tentata**  
*in nova Sessionis Domus Burgi de Edinburgh, primo die*  
*mensis Augusti, Millesimo septingentesimo vigesimo octavo,*  
*per honorabiles Viros ADAMUM COCKBERNE de Ot-*  
*miltoun, Jusficiarium Clericum; Dominos JACOBUM*  
*MACKENZIE de Roystoun & GULIELMUM CALDER-*  
*WOOD de Poltoun, Magistrum DAVIDEM ERSKINE de*  
*Dun, Dominum GUALTERUM PRINGLE de Newhall,*  
*& Magistrum ANDREAM FLETCHER de Miltoun, Com-*  
*missionarios Jusficiarie dict. S. D. N. Regis.*

*Curia legitime affirmata.*

**IN TRAN.**

**James Carnegie of Finhaven, Pannel.**

**Indicted and accused in the præcedentis.**

“ **T**HE Lords Justice Clerk and Commissioners of Justiciary, having considered the Indictment, raised at  
 “ the Instance of *Susanna Countess of Strathmore*, and Mr.  
 “ *James Lyon*, Brother-german and nearest of Kin to the  
 “ deceast *Charles Earl of Strathmore*, with Concourse and  
 “ at the Instance of *Duncan Forbes Esquire* his Majesty's  
 “ Advocate, for his Highness's Interest, against *James Car-*  
 “ *negie of Finhaven*, Pannel, with the foregoing Debate  
 “ thereupon; They Find, and hereby Find, That the Pannel,  
 “ at the Time and Place libelled, having by Premeditation  
 “ and forethought Felony, with a Sword or other mortal  
 “ Weapon, wounded the deceast *Charles Earl of Strathmore*,  
 “ of which Wound he the said Earl soon thereafter died, or  
 “ that he the Pannel was Art and Part thereof, relevant to  
 “ infer the Pains of Law; but Allowed, and hereby Allow  
 “ the Pannel, to prove all Facts and Circumstances he can,  
 “ for taking off the aggravating Circumstances of Forethought  
 “ and

and Premeditation : As also Fand, and hereby Find, That  
 he the said Pannel, Time and Place foresaid, having, with a  
 Sword or other mortal Weapon, wounded the said deceast  
 Earl, of which Wound his Lordship soon died, for that he  
 the Pannel was Art and Part thercof, *separatim* relevant to  
 infer the Pains of Law : And Repelled, and hereby Repell  
 the Defences proponed for the Pannel : And Remitted, and  
 hereby Remit him, and the Indictment, as found relevant,  
 to the Knowledge of an Assize.

AD. COCKBURNE J. P. D.

The Lords Justice-Clerk and Commissioners of Justiciary,  
 Continued the Diet, at the Instance of *Susanna* Countess of  
*Strathmore*, and others, against *James Carnegie* of *Finhaven*,  
 Pannel, till to Morrow, at Nite of the Clock in the Morn-  
 ing; and Ordained Witnesses and Assizers to attend at that  
 Time, each Person under the Pain of Law; and Ordained  
 the Pannel to be carried back to Prison.

*Curia Justiciaria, S. D. N. Regis, tenta*

*in novo Sessionis Domus Burgi de Edinburgh, secundo die*  
*mensis Augusti, Millesimo septingentesimo vigesimo octa-*  
*vo, per honorabiles Viros ADAMUM COCKBURNE de*  
*Ormistoun, Justiciarium Clericum; Dominum GULIEL-*  
*MUM CALDERWOOD de Poltoun, Magistrum DAVIDEM*  
*ERSKINE de Dun, Dominum GUALTERUM PRINGLE*  
*de Newhall, &c. Magistrum ANDREAM FLETCHER de*  
*Miltoun, Commissionarios Justicie dict. S. D. N. Regis.*

*Curia legitime affirmata.*

*INTRANT James Carnegie of Finhaven, Pannel.*

*Indicted and accused ut in diebus precedentibus.*



The Lords proceeded to make choice of the following  
Assizers.

A S S I Z E R S.  
\* Sir Robert Dickson of Inverask, George Loch of Dry-  
law, \* John Watson of Murrays, Walter Riddel of Gran-  
loan, George Warrender of Buntsfield, Thomas Brown of  
Donington, George Habichton of Fordeh, \* James Balfour  
of Pitrig, Robert Dundas Merchant in Edinburgh, David  
Inglish Merchant there, David Baird Merchant there, Ale-  
xander Blackwood Merchant there, \* John Couls Merchant  
there, John Steven Merchant there, and James Ker Gold-  
smith there.

N. B. Those of the Jury marked thus \* protested against the Verdict.

The above Assize being all lawfully sworn, and no lawful  
Objection in the contrary, the Pursuers, for Probation, ad-  
duced the Witnesses afterdeponing, viz.

ROBERT HEPBURN Hammerman in Forfar, solemnly  
sworn, purged, examined and interrogate; Deposed,  
That he was in the Town of Forfar the Ninth Day of May  
last, betwixt the Hours of Eight and Nine a-clock at Night,  
where he did see the deceased Earl of Strathmore, Lord Rose-  
hill, and Mr. Thomas Lyon my Lord Strathmore's Brother,  
walking in the Streets; and that at the same Time did see  
Lyon of Bridgeton, and Finhaven the Pannel, standing near  
to the Lady Auchterhouse her House, upon the Street; what  
Words past betwixt them, he being at a distance, could not  
hear; saw Bridgeton give Finhaven a Rush with his Hand;  
and Finhaven fell in the Gutter; and he saw a Servant of  
the deceased Earl of Strathmore help Finhaven up out of the  
Gutter; and when Finhaven got up, he saw him draw his  
Sword immediately; but that Bridgeton coming up faster  
than Finhaven, he saw Bridgeton offer to draw my Lord  
Strathmore's Sword; but does not know whether he got it  
drawn.

drawn, or not, but saw *Finhaven* draw his Sword before *Bridgeton* offered to draw my Lord *Strathmore's*; and when *Bridgeton* was coming up from the Place where *Finhaven* fell, he look'd over his Shoulder, and seeing *Finhaven* with his Sword drawn, he went faster up to my Lord *Strathmore*, as said is; and when *Finhaven* came up, my Lord *Strathmore* being standing about a Pair of Butts from the Place where *Finhaven* fell, and when *Bridgeton* came up, and endeavour'd to draw my Lord *Strathmore's* Sword, as said is, my Lord turned him about, and set *Bridgeton* aside, and made some Steps towards *Finhaven*, who would be at that Time about six or eight Ells from my Lord; and he did see my Lord endeavour to take *Finhaven* in his Arms when they met, and in a little after that, that he did see my Lord withdraw himself aside from the rest of the Company, and saw him put down his Breeches, and lift up his Shirt, and heard him say he had got a Wound, and repeted these Words three Times, and saw him put up his Shirt, and in a short Time thereafter saw my Lord fall to the Ground. And being interrogate, If he saw *Finhaven* the Pannel make a Thrust at my Lord *Strathmore* with a Sword? *Deponed* he did not see him make the Thrust, but at that Time he did see no other Sword drawn but *Finhaven's*; and after my Lord retired, he saw several other Swords drawn. *Deponed*, That there was no other Company standing with my Lord, but my Lord *Rosehill*, and his own Brother Mr. *Thomas*, before that *Bridgeton* and *Finhaven* came up: And that he saw all this that he has deponed upon, from his own Shop-door, which was about seven or eight Ells distance from that Part of the Street where my Lord *Strathmore* was standing. And being interrogate, If he knows what came of *Bridgeton* after he came up to my Lord? *Deponed*, That he knew not what became of *Bridgeton* after my Lord put him aside: And that there was as much Daylight as he could see what he has deponed upon: And that *Finhaven* the Pannel was in Boots; and that he was coming  
fast



fast up after Bridgeton, but Bridgeton went faster towards my Lord; and that when my Lord Strathmore fell, he saw Thomas Adam Maltman take up my Lord from the Ground, and saw no other body assisting. Deponed he saw the Pannel's Sword twisted out of his Hand, by Mr. Thomas, or my Lord Rosehill; but which of them, he knows not; and that it was after my Lord fell. And deponed, That he did see the Wound in my Lord's Belly, a little below the Navel; and that it was bleeding. Deponed, That he saw Finhaven, after his Sword was twisted out of his Hand, walk in his ordinary way of walking, towards the Lady Auchterhouse her House. *Causa scientia patet.* And this is the Truth as he should answer to God.

Robert Hepburn.

AD. COCKBURN.

Notes. The Procurators for the Pannel having (before purging) objected to the above named Robert Hepburn, why he ought not to be a Witness in this Case; because, since his Citation to be a Witness, he had expressed Malice and ill-will against the Pannel in his Words, viz. That he *thanked God, he had now an Opportunity to hang him, and would do it if he could.* And seeing these Expressions were clearly proven against him, by two concurring Witnesses, in Presence of the Court and Jury, they desired the same might be so marked in the Books of Adjournal. Which, and this Deposition, the Lords left to the Consideration of the Jury.

DAVID Lord Rosehill, solemnly sworn, purged, examined and interrogate, Deponed, (being interrogate for the Pannel) That the Time libelled, the Deponent, on the Occasion of a Burying, was brought in Company with the deceased Earl of Strathmore, the Pannel, and others; and together they dined in Mr. Carnegie of Lours's House; and after

after Dinner and the Burying was over, they together went to the House of Mr. Dickson Clerk of Forfar, where they continued some considerable Time drinking a Glass of Wine together; and after they left this House, they assembled in the House of my Lady Annetborough, in the same Town, the Pannel's Sister, where the deceased Earl had gone to make a Visit. *Deponed*, That during all that Day, and in the several Places, where the deceased Earl, the Pannel, and the rest of the Company were, he the Deponent observed nothing; but great Civility and Friendship betwixt the deceased Earl and the Pannel. *Deponed*, That before they parted from the Lady Annetborough's, the Pannel appeared to the Deponent to be drunk, and far gone in Drink, to the Degree of staggering; and he observed the Pannel drink plentifully in these several Houses. *Deponed*, That he the Deponent during the Time of his being with the said Company, was mostly engaged in Conversation with the deceased Earl, and had not the Occasion to observe what past in Conversation betwixt the Pannel and Mr. Lyon of Bridgeton: And being interrogate, about what he knew of the Character and Temper of the Pannel: *Deponed*, That according to the Deponent's Knowledge of him, which had been of long Continuance, and particularly according to the Character he the Pannel bore in the Country, he was thought to be no wise quarrelsome in his Temper, but to be of a peaceable and good Disposition: *Causa scientis potest*. And this was the Truth as he should answer to God. *Deponed*, That he the Deponent was not present at the Time when the Pannel recovered his Wound. *Deponed*, That on that Day, whereon the deceased Earl of Sutherland was wounded, he the Deponent was



was at *Forfar*, and on the Streets, where he did see the Earl with my Lord *Rosehill* and Mr. *Thomas Lyon* his Brother, and at the same Time, he observed *Finhaven* and Mr. *Lyon* of *Bridgeton* standing together, near to the Lady *Ancherbonse* her Lodging; and soon thereafter looking about, he observed *Finhaven* leaning and falling backwards into a Kennel; and after getting out of it, which he appeared to the Deponent to do very soon, he drew his Sword, and with it went up to the Company, where the Earl, *Bridgeton* and the rest were; and at the first Sight, upon the Pannel's approaching to the Earl, *Bridgeton* and the rest, *Bridgeton* was then interposed twixt the Earl and the Pannel; but all of a sudden and a Clap, the Earl came to be interposed betwixt *Bridgeton* and the Pannel; and at the Time of the said Earl's Interposition, the Pannel was within the Length of his Sword of the Place where *Bridgeton* was standing; that is to say, had been standing. *Deponed*, That he did observe the Pannel make a Thrust with his Sword, and at the Time of so doing, the Earl was standing next the Pannel, and his Face towards him. *Deponed*, That the Earl received a Wound in his Belly, and after receiving it, he saw him pull his Shirt from under his Breeches, and at the same Time saw him bleeding, and soon thereafter his Lordship fell down, and he heard him say that he had got it; and before the Earl fell, and while he was upon the Ground, he did observe his Brother Mr. *Thomas*, with his drawn Sword, twist *Finhaven's* Sword out of his Hand, after seeing and hearing some clashing of their Swords: But at the Time when *Finhaven* made the Push as said is, he observed no other Sword drawn but *Finhaven's*; and at the Time when the Pannel recovered his Thrust, the Pannel and the Earl were very near one another: And all this Time, the Deponent was about the Length of this Room or some more, distant from the said Earl and the Pannel, whose Sides were opposite to the Deponent; and after the Earl of *Strathmore's* Fall, and that his Brother

Mr.

Mr. *Thomas* twisted the Sword out of the Pannel's Hand, the Pannel who was in Boots, ran towards his Sister's Door, after the decess'd Earl was carried to a House, and his Wound was dress'd, he heard his Lordship say, That after the Sword entred his Belly, he the Pannel gave it a second Thrust. *Deponed*, That when he observed *Finhaven* falling into the Puddle, as above said, there was none standing with him or by him, but Mr. *Lyon* of *Bridgeton*. And what he has above deponed, happened on the Ninth Day of *May* last, about the Hour of Nine at Night. *Causa scientie patet*. And this was Truth as he should answer to God.

*Will. Douglas.*

DA. ERSKINE.

ANDREW DOUGLAS, also lawful Son to the said *William Douglas*, solemnly sworn, purged, examined and interrogate, *Deponed*, That the Time and Place libell'd, the Deponent saw *John Lyon* of *Bridgeton* push the Pannel upon the Breast, whereby the Pannel fell in the Gutter, which the Deponent apprehended would have taken him up to the Knee; that it was a very nasty Gutter; and that he saw the Pannel arise out of the Gutter, and immediately draw his Sword, by which Time *Bridgeton* was walking off towards my Lord *Strathmore* and others, who were standing upon the Street, about the Distance of the Length of this Room from the fore-said Gutter: And *deponed*, That he followed after *Finhaven* immediately, after standing a little while with his Comrades; and that before the Deponent came up to the Place where my Lord *Strathmore* and the other Gentlemen were standing, my Lord *Strathmore* had fallen upon the Street. And the Deponent being ask'd, How soon that happened? *Deponed*, That it was in a Moment; and that when the Deponent came up as aforesaid, he saw Mr. *Thomas Lyon* and *Finhaven* engaged, and making Passes at other with their drawn Swords; which the Deponent explained to be only a

O

clashing



flashing with their Swords; and that Mr. Thomas Eyre did  
very soon with the Sword out of Finbaven's Hand; where-  
upon Finbaven ran away to his Sister's, the Lady Auchter-  
house's Lodging, and the Duke was still after him. *Causa  
Scientie patet.* And this was the Truth as he should answer  
to God. *And Andrew Douglas.*

AND FITZGERALD  
JOHN PARRER Residenter in Exchequer, solemnly sworn.

Deposed, That at the  
Time and Place libelled, the Depoient having occasion to  
go to water his Master's Horse, he saw Bridgeton and the  
Pannel, as they came out from the Lady Auchterhouse's  
Lodging, about the Bridge-stone near the Shambles, and  
there heard Bridgeton say to the Pannel, You must give me  
an Answer to my Question, which the Depoient heard was,  
If the Pannel would give his Daughter to the Lord Raschell?  
And upon the Pannel's saying No, Bridgeton asked him, if  
he would drink a Bottle of Wine? and if he would drink the  
King's Health? And upon the Pannel's refusing to do ei-  
ther, the Depoient saw Bridgeton take hold of the Pannel  
by the Breast, and violently pull him into the Kennel; and  
heard Bridgeton at the same Time say, Go and be damnd  
and your King George whom you love so well. And thereaf-  
ter Bridgeton walked towards my Lord Strathmore, Mr. Tho-  
mas Eyre, and my Lord Raschell, who were standing upon  
the Street, at some little Distance; and that Finbaven was  
help'd out of the Sutter by a Footman of my Lord Strath-  
more's: And that upon the Pannel's getting upon the Streets  
again, he immediately drew his Sword, and run up the Street  
after Bridgeton; and before Bridgeton had come the length  
of the Place where the Lord Strathmore and the others were  
standing, he look'd over his Shoulder, and seeing Finbaven  
following him in manner above mentioned, he run up to my  
Lord Strathmore, who, and the rest of the Company, had  
fti

Till their Backs turned to the Place from whence *Finhaven* and *Bridgeton* were coming: And that *Bridgeton*, upon his coming up to *Strathmore*, laid hold upon my Lord *Strathmore's* Sword, and endeavoured to pull it out; upon which my Lord *Strathmore* turning about, pushed *Bridgeton* off, and in the mean time *Finhaven* made a Push with the Sword at *Bridgeton*, and at that instant he observed my Lord *Strathmore* pushing *Bridgeton* aside, and make a Step towards *Finhaven*, and observed at the same time *Finhaven* going on, with his Push to stagger forward with the Thrust upon my Lord *Strathmore*; and thereafter the Company went all through other, so that the Deponent could not see where the Thrust landed: And very soon thereafter the Deponent saw Mr. *Thomas Lyon* with his Sword or *Finhaven's* Sword out of his Hand, which lighted at a good Distance upon the Street: Upon which *Finhaven* run off, staggering towards the Lady *Auchterhouse's* Lodging, and had almost fallen upon the Street before he got in at the Gate; and much about the same Time the Deponent saw the Earl of *Strathmore* fall down upon the Street, and afterwards carried off, and that *Thomas Adam* and *Janet Binnie* were the first that came to his Assistance. Deponed, That the Kennel was deep and dirty, and that the Pannel was deep in it, but not freely covered: That when he arose, his Face was almost as black as his black Coat, and that while these Things past, the Deponent was riding upon the Side of the Street, betwixt the Gutter and the Place where the Earl of *Strathmore* and others were standing; and upon seeing the Beginning of this Accident, he stopped his Horse a little, till he saw as above mentioned. *Causa scientie patet.* And this was the Truth as he should answer to God.

*John Ferrier*

AND FLETCHER

DAVID



**D**AVID BARCLAY, lawful Son to *David Barclay* Brewer in *Forfar*, solemnly sworn; purged, examined and interrogate, *Deponed*, That at the Time and Place libelled he saw *Bridgeton* push the Pannel into a Gutter, and saw a Servant raise him out of the Gutter: And when the Pannel got to the Street, he saw him draw his Sword; and go towards the rest of the Company, and *Bridgeton* was beyond the Earl of *Strathmore*, his Brother and Lord *Rosehill*, who were interposed betwixt the Pannel and *Bridgeton*, and did not see the Pannel push with the Sword; and saw a little after my Lord *Strathmore* fall upon the Street; and immediately after that saw Mr. *Thomas Lyon*, with a naked Sword, beat the Pannel's Sword out of his Hand; and the Pannel immediately run toward the Lady *Auchterhouse's* House, and got in at the Door. And *deponed*, That when *Bridgeton* thrust the Pannel into the Gutter, the Servant who lifted him up, said to *Bridgeton*, or some other Servant standing by, That he was uncivil, though he was a Gentleman: And that what the Deponent saw and heard; as aforesaid, was betwixt Eight and Nine a clock of the Evening of the Day foresaid. *Causa scientia patet*. And this was the Truth as he should answer to God.

*David Barclay.*

W. CALDERWOOD.

**E**LISABETH BINNIE, Spouse to *Andrew Gray* Baxter in *Dundee*, solemnly sworn; purged, examined and interrogate, *Deponed*, That the Time and Place libelled she saw *John Lyon* of *Bridgeton* give a Push to the Pannel, whereby he fell in the Gutter, and was raised out of it by the Lord *Strathmore's* Servant; and when he got to the Street, saw him draw his Sword, and heard him utter an Oath, but did not know what the Words were: And then the Deponent turned her Back, and did not see *Finhaven* push with the Sword.

Sword. *Causa scientie patet.* And this was the Truth as she should answer to God; and declared she could not write.

W. CALDERWOOD.

JOHN MACKY, Servant to Mr. Robert Nairn, Brother German to Alexander Nairn of Drumkilbo, solemnly sworn, purged, examined and interrogate, *Deponed*, That at the Time and Place libelled he did see William Macgysby my Lord Strathmore's Servant, take Finhaven the Pannel out of the Gutter where the Deponent saw him ly; and did see Finhaven draw his Sword after he was out: And did hear one of the Gentlemen, standing in the Place where my Lord Strathmore was wounded, call out to Finhaven, Stand off Sir; and a little Space thereafter he saw the deceased Earl of Strathmore taken up. *Causa scientie patet.* And this is the Truth as he should answer to God; and *deponed* he could not write.

W. A. PRINGLE.

JAMES BARRIE, Servant to James Carnegie of Finhaven, solemnly sworn, purged, examined and interrogate, *Deponed*, That at the Time and Place libelled, the Deponent was holding his Master's Horses upon the Streets of Forfar, near to the Lady Auchterhouse's Lodging: That he had seen the said Earl of Strathmore, and other Company with him, go along the Street from the said Lodging, and his Master and Bridgeton followed at a little Distance, heard them conversing together, and thought that Bridgeton lookt and spoke angry at his Master, and demanded that he should give him an Answer; did not well hear what his Master said, except these Words, That he intended to be of that Resolution still: Whereupon Bridgeton, with his two Hands, push'd his Master into the Gutter, at the same Time expressing himself, Go be damn'd, and let that Man take him up for whom he had so great a Favour. And the Deponent seeing his Ma-

ster



Her lying in the Gutter, quit his Horses and came to relieve  
 but found that my Lord *Strathmore's* Servant had helped  
 him out before he came, and then he did see his Master draw  
 his Sword, and go pretty fast forward, staggering, and saying  
 this cannot be suffered; and then his Master came up to the  
 Company, and see him make a Push at *Bridgeton*, but that  
 before his Master came up to them, he did see *Bridgeton*  
 make an Attempt to draw my Lord *Strathmore's* Sword; and  
 as *Bridgeton* was going toward my Lord *Strathmore*, he did  
 see *Bridgeton* look over his Shoulder to *Finbaven*, and  
 look as if he had been laughing. Observed, that when his  
 Master made the Push, as before mentioned, he seemed as if  
 he'd been falling, and saw him close upon Lord *Strathmore*;  
 This before this, my Lord *Strathmore* had had put *Bridge-*  
*ton* aside, and my Lord *Strathmore* had advanced a Step or  
 half a Step towards *Finbaven*; and then they went all in a  
 Crowd through other, and he did not know what was doing;  
 amongst them, but did see his Master's Sword struck out of  
 his Hand by another Sword, and then did see his Master go  
 down to his Sister's Lodging. Deposed, That as his Master  
 was thrown upon the Back in the Gutter, and was covered  
 near over the Belly, and saw his Face all bespattered with  
 Dirt, and saw the Mire run out of his Boot-tops as he went  
 up the Street; and deposed his Master at that Time was very  
 drunk. Being interrogate further, Deposed, That he has  
 frequently seen his Master drink, and propose the deceased  
 Earl of *Strathmore's* Health at his Table, and this a short  
 Time before the unlucky Accident happened. Deposed,  
 That about a Month before, the late Earl and his Master was  
 together at *Barnside's* Burial, and heard the Earl invite his  
 Master to his House, and heard him answer, That he intended  
 that very soon. Deposed, That his Master rode with Pi-  
 stols that Day, but deposed there was not so much as a Stone  
 in them. Deposed, That eight or ten Days before this un-  
 lucky Accident, his Master bid the Deponent go to the Tay-  
 lor,

for, and got his Cloaths ready, for he intended alfoon as he  
 got his Chaise home, to go with his Lady and make a Visit  
 to my Lord Strathmore at Glammis. *Causa Jecundie pater.*  
 And this is the Truth as he should answer to God.

James Barrie.

W. A. PRINGLE.

**E**LIZABETH VILANT, Servant to Margaret Carnegie  
 Relict of the deceased Mr. Patrick Lyon of Auchterhouse,  
 solemnly sworn, purged, examined and interrogate, Depo-  
 ned, That on the Afternoon of the Ninth of May last, she  
 did see my Lord Strathmore and Finhaven in the Lady Au-  
 chterhouse's House, and did see nor hear nothing pass between  
 them but what was kind and civil, and she was much of the  
 Time in the Room before Bridgeton came in: But after he  
 came in, she was but coming and going; and when my Lady  
 called for a Glass of Brandy, the Deponent brought it in, and  
 my Lady set it by, and saw no Body drink it, and that my  
 Lady told in the Company, That Bridgeton had taken her  
 by the Wrist, and that she had not been so ill used by any  
 Man, and complained of Pain. And deponed, That that Af-  
 ternoon Finhaven appeared to be very drunk. *Causa Jecundie pater.*  
 And this is the Truth as she should answer to  
 God.

Elizabeth Vilant.

A. D. COKBURN.

**I**SABEL MEIK, Servant to the before named and designed  
 Margaret Carnegie, solemnly sworn, purged, examined  
 and interrogate, Deponed, That in the Evening on the  
 Ninth of May last, Finhaven came up to the Lady Auchter-  
 house's House; and the Door being shut after him, she came  
 up after into the said House: And she turning about, upon  
 some People knocking at the Door, and opening the same,  
 there came in two or three Noblemen or Gentlemen with  
 drawn.



drawn Swords; and *Finhaven* being then in the Trance, she took him by the Sleeve, and put him in the Peat-house, and lockt the Door of the Peat-house; and when the Baillic came in Search of him, she delivered the Key to the Baillic, who took him out. And *deponed*, That *Finhaven* was mortally drunk, and when she saw him he was all bespattered with Dirt. *Causa scientie patet*. And this is the Truth as she should answer to God. And *deponed* she could not write.

AD. COCKBURN.

**W**ILLIAM DICKSON Shoemaker in *Forfar*, solemnly sworn, purged, examined and interrogate, *Deponed*, That the Time and Place libelled, the Deponent being at his own Stair-foot, saw two Gentlemen standing together whom he then did not know, and one of them did throw the other in the Puddle, and that Gentleman who was thrown in the Puddle was taken forth thereof by another whom he did not know: And when he got up, he drew his Sword, and went up towards other Three that were standing together, and the Gentleman who threw him in the Puddle was nigh them; he did not see the said Gentleman push with his Sword at any. *Deponed*, That my Lord *Strathmore* was one of the three that was standing there, did not see him fall, but saw him carried away. *Deponed*, That after the Mob rose, he then saw *Finhaven* the Pannel, whom he knew to be the Gentleman that was thrown in the Puddle, and that he was chased back by two Gentlemen with drawn Swords to my Lady *Auchterhouse's* House. *Causa scientie patet*. And this is the Truth as he should answer to God; and cannot write.

W. CALDERWOOD.

**D**AVID CAUTY Merchant and one of the Baillies of *Forfar*, solemnly sworn, purged, examined and interrogate, *Deponed*, That upon the Ninth of *May* last about Nine a-clock in the Evening, the Deponent being in a House near

to

to the Lady *Auchterhouse's* Lodgings, there came an Servant and told that there was very bad News that Night, That the Earl of *Strathmore* was killed by *Finhaven*: Upon which the Deponent went to the Streets, and there found a great Mob, who told the same which he had heard before. Whereupon the Deponent went towards Mr. *Dickson's* House, to which Place the Earl of *Strathmore* was carried; and then the Deponent met with, at least did see, Mr. *Thomas Lyon* and *Bridgeton*, but cannot be sure if my Lord *Rosehill* was with them, who went towards the Lady *Auchterhouse's* Lodgings; And Mr. *Fletcher* of *Balinslow* told the Deponent, That he wanted a Fore-hammer to break open the Lady *Auchterhouse's* Door; whereupon the Deponent, being a Magistrate, told, that it was his Duty to preserve the Peace, and prevent any illegal Proceedings or bad Consequences therefrom. Thereafter the Deponent went towards my Lady *Auchterhouse's* Lodgings, and there found Mr. *Thomas Lyon* and *Bridgeton*, and demanded their Arms, which they delivered to the Deponent; and thereafter went to the said Lodgings, got Access, my Lady *Auchterhouse's* Servant delivering the Key of the Peat-house, where he found *Finhaven* lying upon Lint spread above the Peats, notwithstanding at first the Lady and her Servants denied he was there; and the Deponent told *Finhaven*, he was his Prisoner; and he asked the Deponent, how the Earl of *Strathmore* was? and the Deponent told, he was very bad, as he was informed. And the Deponent having dispersed the Mob, caused carry *Finhaven* to the Prison; and when he came to Prison, he fell a crying to a great Extremity, as if he had been distracted, and said, it was the greatest Misfortune that could happen him, and said, that he deserved to be hanged for wounding such a worthy Earl: And deponed, That *Finhaven* appeared to the Deponent to be in Liquor, and drunk; but he did regret his Misfortune in the same manner as if he had been sober. Deponed, That he was frequently in Pri-



son with *Finhaven*, and in two or three Days after he was imprisoned, he heard him say, That there had been some Grudge or Misunderstanding betwixt the Earl of *Strathmore* and him, but that afterwards it was better cultivated, and in a manner done away; but did not hear the Cause of the said Grudge or Misunderstanding express. *Deponed*. That when he heard *Finhaven* regret the Misfortune that had happened the Earl of *Strathmore*, he said the Design was against another, namely, *Agnes of Bridgeton*. *Causa scientia patet*. And this is the Truth as he should answer to God.

*David Cauty*

W. CALDERWOOD

ALEXANDER BINNIS Provost of *Forfar*, solemnly sworn, purged, examined and interrogate. *Deponed*. That while the Pannel was in Prison within the Tolbooth of *Forfar*, he the Deponent did frequently visit him, and he did hear *Finhaven* say, That there had been some Mistakes and Misunderstandings betwixt him and my Lord *Strathmore*, on account of a Process of Bastardy that was depending before the Lords of Session, but did not hear him speak as if he was under any Grudge or Relentment on that account. *Deponed*. That about a Month before the said Earl's Death, he the Deponent was occasionally at a Burial with the said deceased Earl and the Pannel, betwixt whom the Deponent observed nothing like Misunderstanding, but that their Carriage to one another was civil; and particularly remembers, that at that Time *Finhaven* drank a Glass to the Health of the Countess of *Strathmore*, and after drinking, threw up the Glass, which broke with its Fall, and this happened in the House of Clerk *Dickson* in *Forfar*. And when the Earl of *Strathmore* went to take his Horse, the Pannel and the Deponent waited of him. And being interrogate, If on that Day he heard the Earl of *Strathmore* invite the Pannel to visit him? *Deponed negative*; and, from a Letter put into the

the Clerk's Hands, apprehends that they were not in a Court of visiting. *Causa scientia patet.* And this is the Truth as he should answer to G.O.D.

Alex. Binnie,

DA. ERSKINE,

*Follows the Letter relative to the above Deposition.*

SIR,

WE propose to have an Meeting at your House on Tuesday next, to finish that Affair of Mr. Martine's; wherefore if your Conveniency could allow, I wish you would make an Visit to my Lord Strathmore, to satisfy him, and that he may send one Mandate, so as that every Thing may go on as was proposed. Your Answer is expected by, Sir,

Your most humble Servant,

JA. CARNEGIE

Finhaven, Third May, One thousand seven hundred and twenty eight.

Directed on the Back thus,  
To Provost Alexander Binnie  
in Forfar.

Edinburgh, Second of August One thousand seven hundred and twenty eight, This is the Letter to which Alexander Binnie Provost of Forfar his Deposition of this Date relates.

AD. CORBURN



**C**HARLES CARNEGIE, Brother-german to *Patrick Carnegie of Louris*, solemnly sworn, purged, examined and interrogate, *Deponed*, That he knew that there was not a very good Understanding betwixt the deceast Earl of *Strathmore* and the Pannel, and for the Space of two Years, they had not visited one another; but he never did hear the Pannel express any Grudge or Resentment against my Lord *Strathmore*: Did hear that about two Years ago or thereabouts, there fell out some Mistakes in discoursing about a Bargain of Meal; and that the Pannel was, as he heard, that Night at the *Glamis*, but went away next Morning about Four a-clock; but he the Deponent was not present with them at said Time, but did hear, that what happened betwixt them at that Time, gave Rise to some Misunderstandings. *Causa Scientie pates.* And this is the Truth as he should answer to God. *Charles Carnegie.*  
*DAVID ERSKINE.*

**S**IR *Alexander Wedderburn* of *Blackness*, solemnly sworn, purged, examined and interrogate, *Deponed*, That about the End of *October* One thousand seven hundred and twenty six, there was a Meeting of the Gentlemen of the Shire of *Angus*, concerning their Affairs, in the Town of *Forfar*, where the deceast Earl of *Strathmore* was chosen Preses of the Meeting; and that the Laird of *Finhaven*, who was there also, called down the Deponent to the Street, and express himself to this Purpose; That he had met with several Disobligations from the Earl of *Strathmore*, of which there was just now an Instance, That the Earl being Preses of the Meeting, had kept him out of a Committee that was then chosen; that the Earl was his Debitor, and was owing him several Years Annualrents, That he did not much notice, but that he would resent, or make the Earl report what he had met with, or Words to that Purpose: And this he said

said with an Affeuration, and desired the Deponent to acquaint the Earl with what he had said: But the Deponent refused it, and said they were all Friends together, and he would forget it against to Morrow. And deponed, That he, the Deponent, that same Night did speak to my Lord Gray, to speak to my Lord Strathmore, to get *Finhaven* added to the Committee, saying that would make all Things right; but my Lord Gray returned no Answer to the Deponent. *Causa scientia patet.* And this is the Truth as he should answer to God.

*Alex. Wedderburn.*

W. A. FRINGEL.

**W**ILLIAM DOUGLAS, late Provost and Chirurgion Apothecary in *Forfar*, solemnly sworn, purged, examined and interrogate, Deponed, That upon the Ninth of May last, at Nine a clock at Night, the Deponent was called to the Earl of *Strathmore*, who had got a Wound; and having pained and dressed the Wound, he found it went in about three Inches and a Half above the Navel, and came out to the Back-bone, about two Inches below; that he first dressed the Wound in the Belly, and then that in the Back; that the Earl having asked his Opinion of it, he said he was not without great Hazard, and desired more Assistance; whereupon an Express was dispatched to *Dundee* for Physicians; that the Deponent thought the Wound mortal, and did not think any could recover of that Wound; the Earl lived about Forty nine Hours thereafter, and died upon the *Saturday* Night at Ten a clock of the foresaid Wound. Deponed, That the Earl said to him, that *Finhaven* had given him that Wound, and that after he gave the first Thrust, he pressed the Pomel of the Sword forward with his Breast; and that it was the Deponent's Opinion from what he observed, whatever Sword had given that Wound, was either rusty, or had a Nitch in it, which brought out the *Omentum* without the



the Belly; and the Deponent afterward having seen the Sword, which was called *Finhaven's* Sword, he perceived a Nitch in it, some more than a Hand-brode from the Hilt. *Causa scientie pater.* And this is the Truth as he should answer to God.

William Douglas.

W. A. PRINGLE.

**T**HOMAS CRICHTON Chirurgeon Apothecary in *Dun-*  
*dee*, solemnly sworn, purged, examined and interro-  
gate, *Deponed*, That upon the Evening of the Ninth of *May*  
last, the Deponent was sent for from *Dundee*, to wait on the  
now deceased Earl of *Strathmore*, and arrived at *Forfar* next  
Morning about One a-clock, and there saw the Wound the  
Earl had received, which appeared to the Deponent to have  
been by a Sword, which had entred about three Inches and  
a Half above the Navel, and had gone out at the Back, about  
Four Inches from the Back-bone, a good deal lower than where  
the Sword entred; and the Deponent said the Wound was  
mortal to his Apprehension; and that the Earl of *Strath-*  
*more* died thereof in about two Days after the receiving of it.  
And *deponed*, That the Defunct told the Deponent that *Fin-*  
*haven* had given him that Wound; that he did not believe  
he designed it for him, and yet there was one Circumstance  
which he could not account for, *viz.* That after the Sword  
had entred his Body, *Finhaven* pressed it forward, till their  
Bodies were close together. *Deponed*, That *Bridgeton* is a  
good deal taller than my Lord *Strathmore* was; and that my  
Lord *Strathmore* wore a fair Wig, and *Bridgeton* wore a  
black one usually. *Causa scientie pater.* And this is the  
Truth as he should answer to God.

Tho. Crichton.

AND FLETCHER.

Dr.

**D**R. John Wedderburn Physician in Dundee, solemnly sworn, purged, examined and interrogate. Deposed, That he was called to wait on the Earl of Strathmore, when he received the Wound upon the Ninth of May last; and the Deponent saw him next Morning early, and upon viewing the Wound, it appeared to the Deponent to have been given by a three corner'd Sword, which had entred about three Inches above the Navel, and went out in the Back on the left Side, some Inches from the Back-bone, and about two Inches lower than where it had entred; and the Wound was to the Deponent's Apprehension mortal; and accordingly the Earl of Strathmore died of that Wound upon Saturday's Night, about two Days after he had received it; and the Deponent thereafter saw the Defunct opened, whereby it appeared, that the Weapon had passed through the Caul, the Gut-colon, and the *Plexus mesentericus*: And deposed, That the Defunct told him, that he had an Impression that the Person who gave him the Wound, had by applying his Belly to the Point of the Sword, pushed it forward upon him. Deposed, That Bridgeton is of a much taller Stature, than my Lord Strathmore was; and that my Lord Strathmore usually wore a fair Wig, and Bridgeton a black one. *Causa scientia patet*. And this is the Truth, as he should answer to God.

John Wedderburn  
AND FLETCHER.

**D**R. Charles Fotheringham, Physician in Dundee, solemnly sworn, purged, examined and interrogate. Deposed conform to Thomas Crichton, the former Witness, in omnibus. *Causa scientia patet*. And this is the Truth as he should answer to God.

Cha. Fotheringham.  
AD. COCKBURN.

Follows.



*Follows the Witnesses for the Pannel  
Exculpation.*

**M**ARGARET CARNEGIE Lady Auchterhouse, solemnly sworn, purged, examined and interrogate *ut supra*, Deponed, That on the Afternoon of the Ninth of May last, the Earl of Strathmore, Bridgeton and Finhaven, were in the Deponent's House; she observed no Manner of Difference betwixt the Earl of Strathmore and Finhaven; and that the Pannel and the other Company drunk my Lady Strathmore's Health twice over, and the Pannel tossed up the Glas; during that Time Bridgeton was using rough Expressions to the Pannel, and was taking him by the Breast, and very rude to him; and that when a Glas of Brandy was brought, she desired Bridgeton to take a Dram, and he desired it should be given to Finhaven her Brother, but she said no, for it did appear to her he did not want it, for he was then very drunk; and that Bridgeton took her the Deponent by the Wrist, and squeezed it hard, and said it would be no Difficulty to break it; and during the same Time, Bridgeton took Finhaven by the Arm, and struck his Hand down to the Table, and said, will ye not agree to give one of your Daughters to Rosehill; and Bridgeton further said, if he were a young Man, and if Finhaven refused him one of his Daughters, he would maul him, and with that shook his Hand over him. And deponed, She never knew nor heard of her Brother's being quarrellsome. *Causa scientie patet.* And this is the Truth as she should answer to God.

Margaret Carnegie.  
A.D. COCKBURN.

Dr.

**D**R. *John Kinloch* Physician in *Dundee*, solemnly sworn, purged, examined and interrogate *ut supra*, Deponed, That on the Ninth of *May* last, after *Lours's* Daughter's Burial, the Deponent was in Clerk *Dickson's* House in *Forfar*, in a Room with the Pannel, who asked the Deponent, if he would go into another Room, where the Earl of *Strathmore* was, to see his Lordship; and accordingly they went into the Room where the Earl was, and staid there about an Hour, and drunk several Bottles of Wine together; and during that Time, he saw nothing but mutual Civilities in the Company, without the least Appearance of Quarrels. *Causa scientie patet.* And this is the Truth as he should answer to God.

*John Kinloch.*

W. CALDERWOOD.

**D**AVID DENUNE Sadler in *Canongate*, solemnly sworn, purged, examined and interrogate *ut supra*, Deponed, That in the End of *February*, or Beginning of *March* last, the deceased *Charles* Earl of *Strathmore*, and *Finhaven* the Pannel, with another Gentleman, whom the Deponent did not know, came to the Deponent's House, called for a Dram, in which the Deponent served them with himself; and the Earl first drunk to *Finhaven* and his Family, and then *Finhaven* drunk the Earl of *Strathmore's* Health and his Family's; and at several other Times, when the Earl was not present, the Deponent saw and heard *Finhaven* drink to the said Earl of *Strathmore's* Health. Deponed he has had occasion often to see *Finhaven*, and be in Company with him, and observed him always to be of a good Temper, and no ways inclined to Quarrels. *Causa scientie patet.* And this is the Truth as he should answer to God.

*David Denune.*

W. CALDERWOOD.



**D**AVID OGILVIE, Son to Sir *John Ogilvie of Inver-gubarrity*, solemnly sworn, purged, examined and interrogate *ut supra*, *Deponed*, That he has had frequent Occasions of being in Company with the Pannel, and has oft times heard him testify his Respect and Regard for the late Earl of *Strathmore*, by naming and drinking to his Health; and particularly did hear him do so at his own House, in the Month of *March* or *April* last, when the Deponent was visiting him; that is to say, did hear him drink both to the Earl's Health and his Countess's. *Deponed*, That for these three or four Years past, he has been intimately acquainted with the Pannel, and observed him always to be of a good and peaceable Temper; and the Character he always heard him get in the Country, was, That he was of a peaceable and good Temper, and no ways quarrellsome. *Causa scientie patet.* And this is the Truth as he should answer to God.

*David Ogilvie* *Deponed* *Da Erskine*

**M**R. *John Martine* Minister of the Gospel at *Ochlo*, solemnly sworn, purged, examined and interrogate *ut supra*, *Deponed*, That he the Deponent having had some Affair to do with the deceased Earl of *Strathmore*, as one of the Heritors within the Deponent's Parish, on which Account the Deponent went to wait of his Lordship at his House of *Glamis*, but had the Misfortune to miss him; and upon his Return, having waited of the Pannel, and spoke to him of the Affair, telling him how he had missed my Lord, and desired that the Pannel would fall upon some Expedient to bring either his Lordship, or some from him, to meet with the rest of the Heritors. Upon which the Pannel advised the Deponent once more to wait of his Lordship at *Glamis*; and for his Recommendation and Introduction, he would write a Letter to the Earl, and acquaint him in it that he was the Bearer.

Ac-

Accordingly the Pannel did write a Letter to the Earl to the foreſaid purpoſe, which he deliver'd to the Deponent; and with it he the Deponent did again go to *Glamis*, and at that Time alſo had the Miſfortune to miſs his Lordſhip: Upon which he the Deponent deliver'd the Letter to one Mr. *Greenhill*, the Earl's Servant; and the Meeting of the Heritors holding upon the *Wednesday* thereafter, the ſaid Mr. *Greenhill* came from his Lordſhip, and attended the Meeting: And deponed, That the writing of the foreſaid Letter, and delivering of it, was about the End of *March*, or Beginning of *April* laſt. Deponed, That the Deponent has for theſe three Years paſt been intimately acquaint with the Pannel; and during the whole Courſe of his Acquaintance, he obſerved him always to be regular in his Life, and of a peaceable Temper and Diſpoſition, which is the Character he bears in the Country. *Cauſa ſcientia patet.* And this is the Truth as he ſhould answer to God.

John Martine.  
DA. ERSKINE.

MR. *James Maxwell* Miniſter of the Goſpel at *Forfar*, ſolemnly ſworn, purged, examined and interrogate at ſupra, Deponed, That ſoon after the Earl of *Strathmore* received his Wound, the Deponent waited of him, and from him he went to the Priſon and viſited the Pannel, whom he found in great Diſorder, and under the Impreſſions of Drunkenneſs, his Cloaths being all covered with Mire, and his Face beſmired with Dirt; the Deponent helped him to take off his Cloaths, and ſent for a Coat and ſome Lincins of his own to put on, at leaſt the Coat was his own, which he helped to put on him, and to waſh and clean his Face. The Deponent ſpoke to him ſincerely to the Occaſion of his Viſit, both in reſpect to his Drunkenneſs, and what was publiſhed abroad, he had committed upon the Earl of *Strathmore*, by giving him a Wound; upon hearing whereof, and the Deponent



further saying, That he had to his great Satisfaction heard the Earl of *Strathmore* pray to God to forgive him: Upon this the Pannel fell into the greatest Disorder, tossing himself backwards and forwards upon a Table, and hanging his Head downwards, cried out, Good God! have I wounded the Earl of *Strathmore*, a Person for whom I had great Kindness, and against whom I had no Design. *Causa scientie patet.* And this is the Truth as he should answer to God.

*Ja. Maxwell.*  
DA. ERSKINE.

The Lords Justice-Clerk and Commissioners of Justiciary, Ordained the Assize to inclose instantly, and return their Verdict, in this Place, against to Morrow at Twelve a-clock, and the hail Fifteen to be then present, each under the Pain of Law, and the Pannel to be carried back to Prison.

*Curia Justiciaria S. D. N. Regis, tenta in novo Sessionis Domo Burgi de Edinburgh, tertio die mensis Augusti, Millesimo septingentesimo vigesimo octavo, per honorabiles Viros ADAMUM COCKBURNE de Ormiston, Justiciarium Clericum; Dominum GULIELMUM CALDERWOOD de Poltoun, Magistrum DAVIDEM ERSKINE de Dun, Dominum GUALTERUM PRINGLE de Newhall, & Magistrum ANDREAM FLETCHER de Miltoun, Commissionarios Justiciarie dicti. S. D. N. Regis.*

*Curia legitime affirmata.*

INTRAN.

*James Carnegie of Finhaven, Pannel.*

Indicted and accused, as in all the former Sederunts.

The

The foregoing Persons who passed upon the Assize of the above Pannel, returned their Verdict in Presence of the saids Lords, and whereof the Tenor follows :

“ **E** D I N B U R G H the Third of *August* One thousand seven-  
 “ hundred and twenty eight Years, The above Assize  
 “ having inclosed, did choose Sir *Robert Dickson* of *Inver-*  
 “ *esk* to be their Chancellor, and *George Haliburton* of *For-*  
 “ *del* to be their Clerk : And having considered the Indict-  
 “ ment pursued at the Instance of *Susanna* Countess of *Strath-*  
 “ *more*, and Mr. *James Lyon*, Brother-german and nearest  
 “ of Kin to the deceast *Charles* Earl of *Strathmore*, with  
 “ Concourse, and at the Instance of *Duncan Forbes* Esq; his  
 “ Majesty's Advocate, for his Highness's Interest, against  
 “ *James Carnegie* of *Finhaven*, Pannel ; the Lords Justice-  
 “ Clerk and Commissioners of Justiciary their Interlocutor  
 “ thereupon, with the Witnesses Depositions adduced for  
 “ proving thereof ; with the Witnesses Depositions addu-  
 “ ced for the Pannel's Exculpation : They, by Plurality of  
 “ Voices, Fand the Pannel not guilty. In Witness whereof  
 “ thir Presents are subscribed by our said Chancellor and  
 “ Clerk, in our Names, Place, Day, Month and Year of  
 “ G O D above written.

R O. D I C K S O N Chancellor.

G e o. H a l i b u r t o n Clerk.

The Lords Justice-Clerk and Commissioners of Justiciary,  
 having considered the foregoing Verdict of Assize re-  
 turned against *James Carnegie* of *Finhaven*, Pannel ;  
 They Affoizied, and hereby Affoizie him simpliciter,  
 and Dismissed, and hereby Dismiss him from the Bar.

A D. C O K B U R N E I. P. D.



The foregoing Persons who passed upon the Affairs of the  
above Panel, returned their Verdict in Presence of the said  
Juries, and whereof the Tenor follows:

“ **E** Dineen on the Third of August One thousand seven  
“ hundred and twenty eight Years, The above Affair  
“ having inquired, did choose Sir Robert Dickson of Lawer-  
“ to be their Chancellor, and George Hamilton of Law-  
“ to be their Clerk: And having considered the Indis-  
“ tinct proof in the Instance of James Conner of Strath-  
“ more, and Mr. James Ewen, Brother german and nephew  
“ of him to the deceased Charles Earl of Strathmore, with  
“ Conner, and the Instance of James Forbes Esq; his  
“ Father's Advocate, for his Highness's Interest, against  
“ James Conner of Edinburgh, Panel; the Lord Justice  
“ Clerk and Commissioners of Justiciary, their Jurors  
“ returned, with the Witnesses Depositions adduced for  
“ the said Panel; with the Witnesses Depositions addu-  
“ ced for the Panel's Exculpation: They, by Statute of  
“ Verdict, found the Panel not guilty. In Witness whereof  
“ the Verdicts are subscribed by our said Chancellor and  
“ Clerk, in our Names, at Edinburgh, Month and Year of  
“ God above written.



Dickson Chancellor

George Hamilton Clerk

The Lord Justice Clerk and Commissioners of Justiciary,  
having considered the foregoing Verdict of the said  
Juries, and James Conner of Edinburgh, Panel;  
they, by Statute, and hereby signify to the Bar,  
and to the public, and hereby signify to the Bar,

Ad. Coram I. T. D.

